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In The
# Supreme Court of the United States
October Term, 1987

ATTORNEY GENERAL OF NEW JERSEY,
*Petitioner,*

v.

FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## QUESTIONS PRESENTED

1. Whether a balancing approach must be applied to gauge whether a state tax reporting statute prohibiting access to the courts to a non-complying foreign corporation passes muster under the Commerce Clause of the United States Constitution?

2. Whether, under a balancing approach within the context of the Commerce Clause, a state has a sufficient monetary interest in the enforcement of a tax reporting statute to outweigh any burden imposed upon a foreign corporation in being denied access to the courts for non-compliance.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The Petitioner, the Attorney General of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this proceeding on August 4, 1987.

———o———

## OPINION BELOW

The opinion of the Supreme Court of New Jersey is reported at 108 *N.J.* 277, 528 *A.*2d 1288 (1987) and appears in the Appendix hereto. The opinion of the New Jersey Superior Court, Appellate Division is reported at 205 *N.J. Super.* 251, 500 *A.*2d 746 (App. Div. 1985) and appears in the Appendix hereto. The opinion of the New Jersey Superior Court, Chancery Division, dated April 2, 1985, is unreported and appears in the Appendix hereto.

———o———

## JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on August 4, 1987. This petition for certiorari was filed within 120 days of that date pursuant to an extension granted by this Court on October 23, 1987. This Court's jurisdiction is invoked under 28 *U.S.C.* § 1257(3).

———o———

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 (Commerce Clause) of the United States Constitution.

> [The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. *New Jersey Stat. Anno.* 14A:13-20.

> a. No foreign corporation carrying on any activity or owning or maintaining any property in this State which has not obtained a certificate of authority to do business in this State and disclaims liability for the corporation business tax and the corporation income tax shall maintain any action or proceeding in any State or Federal court in New Jersey, until such corporation shall have filed a timely notice of business activities report.
>
> b. The failure of a foreign corporation to file a timely report shall prevent the use of the courts in this State for all contracts executed and all causes of action that arose at any time prior to the end of the last accounting period for which the corporation failed to file a required timely report.
>
> c. The court in which the issues arise shall be granted the power to excuse the corporation for failure to file a report when due, and restore the right of access to the courts in this State. Such failure to file a report shall be excusable where the court finds the corporation has sustained the burden of establishing that
>
> (1) the failure to file a timely report was done in ignorance of the requirement to file, such ignorance was reasonable in all circumstances; and
>
> (2) all taxes, interest and civil penalties due the State for all periods have been paid, or provided for

by adequate security or bond approved by the director, before the suit may proceed.

## STATEMENT OF THE CASE

The respondent, First Family Mortgage Corporation ("First Family"), is a Florida corporation involved in investing and servicing mortgages. Said corporation had neither a certificate of authority to do business in New Jersey nor did it file any corporation tax returns with New Jersey. Its activities in New Jersey involved owning and servicing mortgages secured by New Jersey real estate which yielded more than $25,000.00 per year in interest income.

The New Jersey Corporation Business Activities Reporting Act, *New Jersey Stat. Ann.* ("N.J.S.A.") 14A:13-14 *et seq.*, requires a foreign corporation, that has neither acquired a certificate of authority to do business in New Jersey nor filed a corporation tax return, to annually file with the Director of Taxation a notice of business activities report in the event it transacts certain activities in New Jersey, including earning more than $25,000.00 from customers residing in New Jersey. Failure to file a timely report bars a foreign corporation from maintaining an action in any federal or state court in New Jersey regarding a cause of action accruing during the period for which the report was not filed.

First Family instituted a mortgage foreclosure action in the New Jersey Superior Court, Chancery Division against Mrs. Linda D. Durham. First Family had not

previous to such court action filed a notice of business activities report with the State of New Jersey. The trial court dismissed the foreclosure action because First Family did not timely file the business report. First Family appealed the dismissal action to the New Jersey Superior Court, Appellate Division, challenging the sanction barring access to the courts for nonfiling on, *inter alia*, Commerce Clause grounds. The New Jersey Attorney General intervened in defense of the challenged statute. The Appellate Division affirmed the trial court and sustained the trial court's dismissal.

The Supreme Court of New Jersey, in a plurality decision, held that the sanction barring access to the courts for non-filing violated the Commerce Clause. The New Jersey court, however, performed "judicial surgery" and held that the sanction would be interpreted to permit subsequent filing of the activities report as a means of curing the nonfiling and permitting access to the courts.*

The plurality decision held that the denial of access to the courts violated the Commerce Clause under a balancing-test analysis. The court held that the burden placed upon interstate commerce in denying access to the New

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* The decision by the Supreme Court of New Jersey was not a "final judgment" because a counterclaim filed by the defendant, Linda Durham, is still pending in the trial court. The counterclaim involves a claim of tortious interference by the plaintiff with defendant's business interests. The counterclaim, however, has no relevance to the constitutional validity of the sanction under the Business Activities Reporting Act. Since this federal issue has been finally decided by the Supreme Court of New Jersey and will not be further affected by the future outcome of the counterclaim, that issue is ripe for further review by this Court. *Cox Broadcasting Corporation v. Cohn*, 420 *U.S.* 469, 480 (1975).

Jersey courts was excessive and outweighed the interest of the state in protecting its tax base. The court determined that, without the right to enforce contracts made in interstate commerce, the right to engage in such commerce would be severely restricted. Three justices agreed completely with the plurality decision (Justices Garibaldi, Pollock and Stein). Two justices (Chief Justice Wilentz and Justice O'Hern) joined in the plurality decision but determined in a separate concurring and dissenting opinion that, under a balancing approach, the interest of the state in protecting its tax revenues is more significant than the relatively minor burden placed upon foreign corporations in simply filing the annual business activities report. This relatively insignificant burden was deemed outweighed by the important concern of New Jersey in protecting its tax dollars and encouraging tax reporting by foreign corporations.

A third and dissenting opinion, authored by Justice Handler and joined by Justice Clifford, held that the denial of access to the courts constitutes a per se violation of the Commerce Clause and is thus invalid. The dissent reasoned that previous precedents decided by this Court, particularly *Allenberg Cotton Co., Inc. v. Pittman*, 419 *U.S.* 20 (1974), have mandated that "door closing" statutes barring foreign corporations access to the courts interfere with interstate commerce and are facially void.*

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* First Family also challenged the Reporting Act under the Supremacy Clause of the Federal Constitution claiming that it conflicted with the National Housing Act, 12 *U.S.C.* § 1716 *et seq.* This claim was rejected by the Supreme Court of New Jersey and is not the subject of this petition.

## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW IMPROPERLY CURTAILED THE AUTHORITY OF THE STATE OF NEW JERSEY TO ENFORCE TAX FILING REQUIREMENTS AGAINST FOREIGN CORPORATIONS MAINTAINING THRESHOLD BUSINESS ACTIVITIES IN THE STATE.

The Corporation Business Activities Reporting Act, *N.J.S.A.* 14A:13-14 *et seq.*, provides that every foreign corporation which carried on any activity or owned or maintained any property in this State during any calendar or fiscal accounting year ending after December 31, 1973 is required to file a notice of business activities with the New Jersey Director of the Division of Taxation. *N.J.S.A.* 14A:13-15. The activities or property maintenance in New Jersey which require foreign corporations to file this report are specifically delineated in the statute as follows: (a) the maintenance of an office or other place of business; (b) the maintenance of personnel; (c) the ownership or maintenance of real and/or tangible personal property directly used by the corporation in New Jersey; (d) the ownership or maintenance of tangible and/or intangible property which is used by others; (e) the receipt of payments from persons residing in New Jersey or businesses located in New Jersey aggregating in excess of $25,000.00 regardless of any other connections with this State; or (f) the derivation of income from any source or sources within New Jersey.

The Reporting Act further provides that a foreign corporation is not required to file the notice of business activities report if it received either a certificate of authority to do business in New Jersey or filed a timely tax

return under either of the corporation taxes imposed by New Jersey. The Reporting Act requires that every foreign corporation subject to its provisions must file a notice of business activities report on or before the fifteenth day of the fourth month after the close of the corporation's calendar or fiscal accounting year. *N.J.S.A.* 14A:13-18. The notice form requests information necessary to the determination of whether a foreign corporation should be subject to a corporation tax.

In an effort to secure compliance with this law, the New Jersey Legislature provided that a foreign corporation, which has not obtained a certificate of authority or which disclaims corporate tax liability and which carries on the designated activities in New Jersey, is precluded from maintaining an action in the New Jersey courts if it failed to file a notice of business activities report for the period in which the cause of action accrued. *N.J.S.A.* 14A:13-20(b). *N.J.S.A.* 14A:13-20(c) provides for an exception to the statutory penalty in the event the court finds that a foreign corporation had a justifiable excuse in not filing and, in addition, has satisfied all corporate taxes or posted sufficient security with the Director of Taxation in lieu thereof.

The reporting act had its genesis in the *Report of the New Jersey Tax Policy Committee,* Vol. V, pp. 32-34, ("*Report*") submitted to Governor William T. Cahill on February 23, 1972. That same *Report* (Vol. V, pp. 20-25), also recommended the enactment of a second tier net income tax in order to impose a tax on foreign corporations neither qualified nor doing business within New Jersey in the traditional franchise tax sense but, nevertheless, deriv-

ing income from sources in this state and having adequate due process nexus with New Jersey to give this state jurisdiction to tax. The second tier net income tax was enacted into law as *N.J.S.A.* 54:10E-1 *et seq.*, Laws 1973, chapter 170, and became effective June 7, 1973, contemporaneously with the effective date of the Corporation Business Activities Reporting Act (Laws 1973, chapter 171).

The *Report* noted that New Jersey already had on its books a statute requiring a foreign corporation to obtain a certificate of authority from the Secretary of State before doing business in the State. *N.J.S.A.* 14A:13-1 and 4. Although the sanctions in that law for failure to obtain a certificate of authority included small fines as well as a prohibition against the maintenance of suits in the New Jersey courts (*N.J.S.A.* 14A:13-11), the Tax Policy Committee felt that this statute was not a reporting statute related to protecting the tax revenues of the state, particularly in the context of the proposed enactment of a second tier net income tax.

The *Report* thus recommended the enactment of the Corporation Business Activities Reporting Act in order to establish a means for the New Jersey Division of Taxation to secure data from foreign corporations maintaining prescribed activities in New Jersey in order to determine the possible subjectivity of such corporations to the New Jersey tax laws. It is clear in analyzing the statute that mere compliance with its provisions by filing the required notice does not result in subjecting a complying foreign corporation to a tax or to any other liability. Rather, the notice requirement is merely informational and permits the Division of Taxation to initiate an investigation in order to

determine whether the foreign corporation may be subject to a state tax.

It has been well established, at least since *Cooley v. Board of Wardens,* 12 *How.* 299 (1851), that the Commerce Clause not only provides an affirmative grant of authority to Congress, but also " . . . even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit,* 329 *U.S.* 249, 252 (1946). It is equally well established, however, " . . . under our constitutional scheme the States retain 'broad power' to legislate protection for the citizens in matters of local concern. . . ." *Great A. & P. Tea Co. v. Cottrell,* 424 *U.S.* 366, 371 (1976). The local concerns over which the states retain comprehensive authority, even when interstate commerce may be affected, include protection of the public safety and convenience through reasonable regulations. *Union Brokerage Co. v. Jensen,* 322 *U.S.* 202 (1944).

This Court has employed a variety of standards to gauge the validity of state enactments under the Commerce Clause and has consistently distinguished between outright protectionism and more indirect and less severe burdens on the free flow of commerce. *Lewis v. BT Investment Managers, Inc.,* 447 *U.S.* 27, 36 (1980). It has been noted that,

> [W]here simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected [*Philadelphia v. New Jersey,* 437 *U.S.* 617, 624 (1978)].

However, a more practical balancing approach is utilized to gauge the validity of state laws under a Commerce Clause analysis which are not deemed protectionist and

clearly serve a valid state purpose. *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142 (1970).

Moreover, there is an additional line of Commerce Clause cases dealing with state qualification statutes under which foreign corporations are precluded from commencing suit in the state courts in the event the foreign corporations have not qualified to do business in the state. Such statutes have been facially sustained. *Eli Lilly v. Sav-on Drugs*, 366 *U.S.* 276 (1961); *Union Brokerage Company v. Jensen, supra.*

Even in *Allenberg Cotton Co., Inc. v. Pittman*, 419 *U.S.* 20 (1974), this Court did not apply a per se rule of invalidity. In that case, a Tennessee cotton merchant executed a contract to purchase cotton from a Mississippi farmer. As a result of a breach of contract, the Tennessee merchant filed suit in the Mississippi courts against the Mississippi farmer. As a defense, the Mississippi farmer maintained that the Tennessee merchant was barred from utilizing the Mississippi courts since he had not obtained the requisite certificate to do business in Mississippi. This Court, after analyzing the factual record and determining that the Tennessee cotton merchant had not transacted any localized business within the state of Mississippi, held that the Mississippi statute could not validly bar the institution of the suit in the Mississippi courts under the Commerce Clause. It is appropriate to note that this Court, in sustaining the right of the Tennessee plaintiff to institute action in the Mississippi court, did not invalidate the statute but merely established that its application was limited by the Commerce Clause to only bar such suits brought by foreign corporations that transacted the requisite business within the state.

The Supreme Court of New Jersey, although recognizing that a balancing test is the appropriate mode for considering the validity of the reporting statute, nevertheless misapplied that test and wrongly determined that the sanction for noncompliance with the reporting statute violated the Commerce Clause. The plurality correctly acknowledged that without the Reporting Act, the New Jersey Division of Taxation would find it almost impossible to determine which foreign corporations were maintaining business activities in New Jersey warranting subjectivity to a corporate tax; that foreign corporations would essentially be filing tax returns on a voluntary basis; that foreign corporations maintaining undetected business activities in New Jersey would be at a competitive business advantage by avoiding the New Jersey tax; and that New Jersey would be deprived of tax revenues. Although concerned about the loss to New Jersey of the sanction for nonfiling, the plurality determined that closing the courthouse door to noncomplying foreign corporations creates an unconstitutional disruption of interstate commerce under a balancing approach and requires an invalidation of the sanction. The plurality so decided notwithstanding that, 1) the Reporting Act contains an escape clause for foreign corporations who innocently failed to comply with the reporting requirements and 2) only those foreign corporations which knowingly and willfully risk the sanction of nonaccess to the New Jersey courts in order to avoid detection by New Jersey tax officials are affected by the sanction.

The plurality's holding has now resulted in a practical emasculation of the statute. Foreign corporations maintaining the threshold business activities in New Jersey

designated in the Reporting Act can ignore the reporting requirements with impunity and escape detection by the New Jersey tax department. Only in the event that such corporations require the use of the New Jersey courts is there the inducement for filing the notice of business activities. Since under the plurality's holding such filing "cures" previous nonfiling, the foreign corporation suffers no prejudice as a result of the late filing and is entitled to access to the New Jersey courts for causes of action occurring in any prior period.

Under this Court's balancing test, an important consideration is whether an alternative means could promote the local purpose without discriminating against interstate commerce. *Hughes v. Oklahoma*, 441 *U.S.* 322, 336 (1979). It is clear that no alternative means other than the door-closing sanction could operate as effectively to assure compliance with the Reporting Act.

The court below, therefore, has misapplied the balancing test under the Commerce Clause. It has thus exaggerated the burden of the door-closing sanction upon interstate commerce without recognizing that its impact is essentially directed only at willful violators. It has further minimized the critical need for a proper sanction as a means of securing proper compliance with the Reporting Act. The State of New Jersey has been improperly deprived of a valuable tax collection tool as a result of the holding below. This incorrect application of Commerce Clause principles to an important tax collection mechanism justifies the grant of certiorari to review the judgment below.

Moreover, this case clearly has broader implication than merely the parochial concern of the State of New

Jersey. Proper tax collection and tax reporting standards are a significant concern to all of the state taxing jurisdictions. The Commerce Clause was never intended to provide interstate commerce with competitive tax advantages relative to domestic commerce. Its purpose was to secure fairness for all commerce. The purpose of requiring foreign corporations to file periodic reporting statements with tax jurisdictions is to assure tax fairness and tax uniformity throughout this nation. Such reporting requirements can be effective only if reasonable sanctions are applied to noncomplying foreign corporations. The barring of access to a state's courts is an effective and reasonable remedy to insure compliance with a tax reporting provision. There is clearly no sanction that is equal in effectiveness The reasonableness of the sanction is demonstrated by the fact that only a wilfully noncomplying corporation is barred from access to the New Jersey courts.

This case, therefore, has national implications. It relates to the broad and important question of permitting a state to enforce its taxing statutes upon foreign corporations who are maintaining a presence or earning income in the taxing jurisdiction. The Commerce Clause was never intended to interfere with such a sound policy. The petition for certiorari should be granted to enable this Court to review this important issue.

———o———

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

W. Cary Edwards
ATTORNEY GENERAL OF
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By: /s/ Harry Haushalter
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# APPENDIX

SUPREME COURT OF NEW JERSEY
A-39 September Term 1986

FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA,

Plaintiff-Appellant,

v.

LINDA A. DURHAM and MR. LINDA DURHAM,

Defendants,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

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Argued October 7, 1986—Decided August 4, 1987

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 205 *N.J. Super.* 251 (1985).

*William M. E. Powers, III*, argued the cause for appellant (*William M. E. Powers, Jr.*, attorney).

*Harry Z. Haushalter*, Deputy Attorney General, argued the cause for respondent (*W. Cary Edwards*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by GARIBALDI, J.

The sole issue in this case is whether the Corporation Business Activities Reporting Act (the Reporting Act),

*N.J.S.A.* 14A:13-14 to -23, violates the commerce clause, *U.S. Const.* art. I, ¶8, cl. 3, or the supremacy clause, *U.S. Const.* art. VI, ¶2.

Plaintiff, First Family Mortgage Corporation of Florida, a Florida Corporation whose principal place of business is in Illinois, violated the Reporting Act by failing to file a Notice of Business Activities Report (Activities Report) as required by *N.J.S.A.* 14A:13-15. Failure to file a timely Activities Report bars a foreign corporation from maintaining any action or proceeding in any state or federal court in New Jersey to enforce any cause of action accruing during an accounting period in which the corporation failed to file an Activities Report. *N.J.S.A.* 14A:13-20b. Pursuant to *N.J.S.A.* 14A:13-20b, the trial court dismissed plaintiff's mortgage foreclosure suit. The Appellate Division affirmed. 205 *N.J. Super.* 251 (1985). We granted plaintiff's motion for leave to appeal, 103 *N.J.* 507 (1986).

We now sustain the constitutionality of *N.J.S.A.* 14A:13-20 and hold that the State can require a foreign corporation to file an Activities Report and can withhold access to courts *until* the corporation complies. However, once a foreign corporation files an Activities Report and meets the requirements of *N.J.S.A.* 14A:13-20c(2), the commerce clause requires that the corporation be allowed to pursue any cause of action existing at the time of the filing (or accruing during that accounting period) regardless of when it arose.

## I

Plaintiff invests in and services mortgages guaranteed by the Veteran's Administration and Farmer's Home

Administration, and acts as a servicing custodian for Government National Mortgage Association (GNMA) loans. Plaintiff does not have a certificate of authority to do business in this state, does not file a New Jersey corporation business tax return or a New Jersey corporation income tax return, and has no officers, employees, or representatives in New Jersey. While plaintiff does not originate any loans in New Jersey, it does own loans secured by New Jersey real estate. Such loans provide plaintiff with more than $25,000 per year in interest income.

On July 24, 1980, plaintiff acquired fifty-four GNMA home mortgages secured by New Jersey real estate from Midstate Mortgage and Service Company, an Illinois corporation. Defendants, Mrs. and Mr. Linda A. Durham, were the mortgagors on one of these mortgages. On January 1, 1983, defendants defaulted on their monthly payment to plaintiff. Plaintiff's representatives communicated with defendants by mail and telephone in an attempt to collect on the delinquent account. When these efforts failed, plaintiff instituted a mortgage foreclosure action in the Chancery Division.

The trial court dismissed plaintiff's action because plaintiff had failed to comply with the Reporting Act. The court based its ruling on *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J. Super.* 358 (App. Div. 1977), which upheld the constitutionality of the Act. Nonetheless, the court opined that the Reporting Act, as applied to plaintiff, violated the commerce clause. This view was based upon the court's interpretation of *Allenberg Cotton Co., Inc. v. Pittman*, 419 *U.S.* 20, 42 *L.Ed.* 195 (1974), and related Supreme Court decisions holding that a state can-

not require a foreign corporation engaged solely in interstate commerce to obtain a license to do business within that state.

The Appellate Division affirmed, distinguishing this case from the licensing cases on the ground that the Reporting Act, unlike the typical licensing statute, "does not expose foreign corporations engaged solely in interstate commerce to lawsuits in this state. It merely requires that foreign corporations receiving substantial annual payments from New Jersey residents file information that will enable New Jersey to determine whether they are exempt from taxation." 205 *N.J. Super.* at 255. The court also rejected plaintiff's argument that the Reporting Act violates the supremacy clause by undermining the policy of the National Housing Act: "The slight inconvenience of filing the notice [Activities Report] will not destroy the market for GNMA mortgages on homes in New Jersey and in other states having a similar requirement."[1] *Id.*

II

*N.J.S.A.* 14A:13-15 provides in pertinent part:

> Every foreign corporation which during any calendar or fiscal accounting year ending after December 31, 1973, carried on any activity or owned or maintained any property in this State, unless specifically exempted under section 3 of this act, shall be required to file a notice of business activities report, as hereinafter provided.

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[1]The Appellate Division found there was an insufficient factual record to sustain the Chancery Division's conclusion that plaintiff was not engaged in intrastate business activities. 205 *N.J.* at 256. We agree.

> Activities or property maintenance in this State which require corporations to file this report are:
>
> * * *
>
> e. receiving payments from persons residing in this State, or businesses located in this State, aggregating in excess of $25,000 regardless of any other connections with this State;
>
> * * *

Every foreign corporation subject to the Reporting Act must file an Activities Report with the Director of the Division of Taxation of the State of New Jersey, on or before the fifteenth day of the fourth month after the close of the corporation's calendar or fiscal accounting year. *N.J.S.A.* 14A:13-18a. Pursuant to *N.J.S.A.* 14A:13-16b, a foreign corporation is not required to file, if it has received either a certificate of authority to do business in this state or has filed a timely tax return under the Corporation Business Tax Act, *N.J.S.A.* 54:10A-1 to -40, or the Corporation Income Tax Act, *N.J.S.A.* 54:10E-1 to -24 (the Second Tier Income Tax).[2]

*N.J.S.A.* 14A:13-20a and b set forth sanctions for a foreign corporation's failure to file an Activities Report:

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[2] *N.J.S.A.* 14A:13-16 provides:

> A foreign corporation shall not be required to file a notice of business activities report if
>
> a. by the end of an accounting period for which it was otherwise required to file a notice of business activties report under this act, it had received a certificate of authority to do business in this State; or
>
> b. a timely return has been filed under the Corporation Business Tax Act or the Corporation Income Tax Act for such accounting period.
>
> [footnotes omitted)]

> a. No foreign corporation carrying on any activity or owning or maintaining any property in this State which has not obtained a certificate of authority to do business in this State and disclaims liability for the corporation business tax and the corporation income tax shall maintain any action or proceeding in any State or Federal court in New Jersey, until such corporation shall have filed a timely notice of business activities report.
>
> b. The failure of a foreign corporation to file a timely report shall prevent the use of the courts in this State for all contracts executed and all causes of action that arose at any time prior to the end of the last accounting period for which the corporation failed to file a required timely report.

However, a Court may excuse a corporation's failure to file an Activities Report

> where the court finds the corporation has sustained the burden of establishing that
>
> (1) the failure to file a timely report was done in ignorance of the requirement to file, such ignorance was reasonable in all circumstances;
>
> (2) all taxes, interest and civil penalties due the State for all periods have been paid, or provided for by adequate security or bond approved by the director, before the suit may proceed.
>
> [*N.J.S.A.* 14A:13-20c.]

The Reporting Act was recommended in the *Report of the New Jersey Tax Policy Committee,* Vol. V, at 32-34 (*Report*) submitted to Governor William T. Cahill on February 23, 1972. The *Report* recommended that New Jersey do as many other states had done, "by adding to their corporate franchise taxes, or by substituting for them, an income tax levied, not on the privilege, or the doing of busi-

ness in the State, but on income derived from sources within the State." *Id.* at 20. It explained that "equity demands business carrying on activities in the State and exploiting the New Jersey market make some contribution to the costs of maintaining governmental operations and the services provided by the State. . . ." *Id.* at 22. The *Report* recommended the enactment of a "second tier" income tax to impose a tax on foreign corporations neither qualified nor doing business within the state in the traditional franchise tax sense (who do not maintain an office or employ or own property or capital in the state), but who, nevertheless, derive income from sources in the state and have an adequate due process nexus with New Jersey to give the state jurisdiction to tax.[3] The Tax Policy Committee recognized that for the Second Tier Income Tax to be effective, the state had to be able to locate those foreign corporations that would be subject to the new proposed tax:

> [I]t is important, in order to safeguard the State's revenues and reduce unfair tax-free competition with businesses that pay taxes to this State, that the Legislature adopt a more effective technique for discovering foreign corporations that may be taxable, but that are now paying no taxes, and would otherwise escape the broadened jurisdiction of the proposed second tier tax. To seek to accomplish that objective, we propose that a statutory provision be adopted requiring certain non-qualified foreign corporations to file with

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[3]The Corporation Income Tax is a tax on a corporation's "entire net income," measured in the first instance by the corporation's federal taxable income. *N.J.S.A.* 54:10E-4i. This income is apportioned to New Jersey by application of a three part formula based upon receipts, property, and payroll within and outside the state. *N.J.S.A.* 54:10E-6.

> the Division of Taxation a Notice of Business Activities.
>
> [*Report, supra,* at 33].

Moreover, the *Report* specifically stated the reason for *N.J.S.A.* 14A:13-15e:

> It would also appear desirable, in order to establish a simple, objective quantitative test for the filing of the Notice to require any foreign corporation that receives payments from persons residing in the State, or business located in the State, aggregating a minimum dollar amount to be designated by the statute, to file the Notice, regardless of any other connections with the State.
>
> [*Report, supra,* at 34].

The Legislature adopted the Tax Policy Committee's recommendations and enacted the Reporting Act, in conjunction with the Corporation Income Tax Act (the Income Tax), making both Acts effective on June 7, 1973. As part of the Reporting Act, the Legislature adopted *N.J.S.A.* 14A:13-15e, viewing the receipt of at least $25,000 per year "as at least a preliminary indication that a foreign corporation derived income from sources within New Jersey and was subject to the corporation income tax." *Avco Fin. Servs. Consumer Discount Co. One, Inc. v. Director, Div. of Taxation,* 100 *N.J.* 27, 32 (1985).[4]

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[4]It is undisputed that plaintiff satisfies all the conditions that would bar it from maintaining this action under the Reporting Act and fulfills none of the Act's exceptions. Accordingly, unless the Reporting Act is deemed unconstitutional, plaintiff is barred from maintaining its foreclosure suit.

## III

The commerce clause of the United States Constitution, although phrased as an affirmative grant of power to Congress to regulate foreign and interstate commerce, is "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 *U.S.* 82, 87, 81 *L.Ed.*2d 71, 76 (1984). This limitation, however, is not absolute. States "retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis v. BT Inv. Managers, Inc.*, 447 *U.S.* 27, 36, 64 *L.Ed.*2d 702, 711 (1980).

In general, "[s]tate regulation affecting commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation." L. Tribe, *American Constitutional Law*, § 6-5 at 326 (1978). As stated by the Court in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 178, 25 *L.Ed.*2d 174, 178 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 *U.S.* 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and

> on whether it could be promoted as well with a lesser impact on interstate activities.
> [citation omitted]

Notwithstanding this general rule, a statute will be held *per se* invalid if its sole purpose is economic protectionism: "where simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 *U.S.* 617, 624 57 *L.Ed.* 475, 481 (1978). The purpose of the Reporting Act is to achieve a substantial and legitimate state interest, not to encourage simple economic protectionism of local businesses at the expense of interstate commerce. The history of the Act conclusively establishes that it was enacted to

> enable the Division of Taxation to obtain pertinent data from any foreign corporation which carries on an activity or runs or maintains property in this State but which has not obtained a certificate of authority to do business in New Jersey, to the end that a proper determination may be made as to whether such corporation is subject to any State tax.
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> [*Avco Fin. Servs. Consumer Discount Co. One, Inc. v. Director, Div. of Taxation*, *supra*, 100 *N.J. at* 33, (*quoting Associates Consumer Discount Co. v. Bozzarello*, *supra*, 149 *N.J. Super* at 362).][5]

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[5]As we recognized in *American Bank & Trust Co. of Pennsylvania v. Lott*, 99 *N.J.* 32, 39 (1985):

> This exception for timely filing a relevant corporate tax return underscores the basic purpose of the Reporting Act, which is to provide the Division of Taxation with information to determine the tax liability of foreign corporations. *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J. Super.* 358, 362 (App. Div. 1977). Consistent with that purpose, the notice of business activities report form is issued by the Division of Taxation and is filed with that Division.

Plaintiff contends that the Supreme Court has created a second exception to the balancing rule in a series of decisions that invalidated state statutes that imposed licensing requirements on foreign corporations engaged solely in interstate commerce.[6] Plaintiff argues that the Reporting Act is an unconstitutional "forced licensure" statute despite the clear evidence that the goal of the Reporting Act is merely to provide information that will help the state collect the Corporate Income Tax.

It is true that the Supreme Court has held that forced licensure statutes violates the Commerce Clause. *See Allenberg Cotton Co. v. Pittman, supra,* 419 *U.S.* 20, 42 *L.Ed.* 2d 195 (statutes withheld access to courts from foreign corporations doing business within the state without certificates of authority); *Dahnke-Walker Milling Co. v. Bondurant,* 257 *U.S.* 291, 293, 66 *L.Ed.* 239, 244, 245 (1921) (a state cannot by statute "impose burdensome conditions" on interstate commerce; a "corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce"); Sioux Remedy Co. v. Cope, 235 *U.S.* 197, 59 *L.Ed.* 193 (1914) (statute withheld access to courts from foreign corporations doing business in the state until it filed its

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[6]Plaintiff relies on our decision in *Coons v. American Honda Motor Co,* 94 *N.J.* 307 (1983), *cert* denied 469 *U.S.* 1123, 83 *L.Ed.*2d 800 (1985). In that case, we held that the statute that tolls the running of statute of limitations in actions against foreign corporations that are not "represented" in the state was a forced licensure statute. Hence, we found it unconstitutionally burdened interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate to do business in New Jersey in order to gain the benefit of the statute of limitations.

Articles of Incorporation with the state and appointed a resident upon whom service of process could be served); *International Text-book Co. v. Pigg*, 217 *U.S.* 91, 54 *L.Ed.* 678 (1910) (state could not require foreign corporation to file a "complete detailed statement of the condition of such corporation" including information about its officers, directors, managers, assets, liabilities, and capital stock).

Nonetheless, a close analysis of those forced licensure cases discloses that in each of the cases the Court found that the qualification statute imposed *unreasonable* conditions on the foreign corporation's right to sue in a state court. As we stated in *Materials Research Corp. v. Metron, Inc.*, 64 *N.J.* 74, 79 (1973):

> the law has long been settled that a state may not impose a qualification statute *which unduly burdens interstate commerce*, *Dahnke-Walker Milling Co. v. Bondurant*, 257 *U.S.* 282, 42 *S.Ct.* 106, 66 *L.Ed.* 239 (1921); *see, e.g., International Text-Book Co. v. Pigg*, 217 *U.S.* 91, 30 *S.Ct.* 481, 54 *L.Ed.* 678 (1910); *Sioux Remedy Co. v. Cope*, 235 *U.S.* 197, 35 *S.Ct.* 57, 59 *L.Ed.* 193 (1914).
>
> [(emphasis added.)]

An analysis of the Reporting Act shows how it differs from licensing statutes and discloses that it does not unduly burden interstate commerce. First, the Reporting Act does not require every foreign corporation doing business in New Jersey to file an Activities Report. Instead, the reporting requirement is carefully limited to those corporations that satisfy any of the conditions cited in *N.J. S.A.* 14A:13-15, and are therefore likely to owe a tax.

Moreover, the burden imposed on a foreign corporation by the Reporting Act is minimal. Unlike a licensing

statute, the Reporting Act does not require a foreign corporation to obtain permission from the state prior to doing business here. The Act does not force foreign corporations to secure a certificate of authority to do business or any other license in New Jersey. Moreover, licensing statutes generally require corporations to submit to in-state service of process. L. Tribe, *supra*, § 6-13 at 342; *see, e.g.*, *N.J.S.A.* 14A:13-4(1)(d). In order to secure a certificate of authority to do business in New Jersey, a foreign corporation must maintain a registered agent within the state to accept services of process, file with the Secretary of State an annual report and a copy of its corporate charter, and submit to the Corporation Business Tax, which imposes a higher rate of tax than the second tier income tax. *N.J.S.A.* 14A:13-4(1); *N.J.S.A.* 54:10A-2. Such requirements are strong disincentives for many corporations from doing interstate business in that state, especially if the amount of their business would be minimal.

The information required by the Acitvities Report is easily accessible to the corporation. The Report form merely asks corporation to provide identification information (name, address, place of incorporation, etc.), and then asks whether the corporation satisfies any of the conditions listed in *N.J.S.A.* 14A:13-15. The form also asks the corporation whether it has any liability under the Second Tier Tax Act.

Furthermore, compliance with the Reporting Act does not subject a foreign corporation to any tax liability or result in any other consequences. Rather, the notice requirement is merely an information gathering tool that permits the Division of Taxation to initiate an investigation to de-

termine whether the foreign corporation having commercial contacts with the state may be liable for the constitutionally valid New Jersey Second Tier Income Tax.[7] Without the benefit of the information contained in the Activities Report, the Director would find it almost impossible to determine which foreign corporations are doing business in New Jersey and which are liable under the Second Tier Income Tax Act. The Director would be greatly dependent on voluntary compliance with the Tax Act. This would deprive the state of revenue, be unfair to those corporations that comply voluntarily, and give an unfair advantage to these corporations that avoid the tax. Therefore, we hold that it is constitutional for New Jersey to require foreign corporations that satisfy the conditions in *N.J.S.A.* 14A:13-15 to file an Activities Report.

## IV

This holding, however, does not end our inquiry because the Reporting Act also imposes an important sanction for noncompliance. Failure to file an Activities Report prevents a corporation from using New Jersey courts to pursue any cause of action arising "at any time prior to the end of the last accounting period for which the corporation failed to file a required timely report." *N.J.S.A.* 14A:13-20b. It is this harsh penalty that we find constitutionally infirm.

It is without question that *N.J.S.A.* 14A:13-20b is rationally related to the State's interest in maintaining compliance with the Reporting Act. The prospect of being

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[7]The constitutionality of the tax was upheld in *Avco Financial Services Consumer v. Director, supra,* 100 *N.J.* 27.

unable to enforce an important contract will encourage corporations to file the Activities Report. The provision will also aid in detecting those corporations that have violated the Act because defendants will have a strong incentive to raise the Reporting Act as a defense.

The concurring and dissenting opinion of Wilentz, C.J., would have us uphold *N.J.S.A.* 14A:13-20b on these grounds, without further analysis. It disapproves of balancing tests in no uncertain trems: "'[S ch an inquiry is ill suited to the judicial function and should be undertaken rarely if at all.'" *Post* at — (slip. op. at 21) (quoting *CTS Corp. v. Dynamics Corp.*, 55 *U.S.L.W.* 4478, 4485 (U.S. Apr. 21, 1987) (Scalia, J., concurring)). While the opinion does purport to apply a balancing test, its emphasis upon the interests of the state, to the exclusion of any discussion of the burdens placed on interstate commerce, ensures that the vast majority, if not all, of non-protectionist restraints on interstate commerce will receive judicial approval. We find such an approach inconsistent with the spirit of the commerce clause and governing case law.

Applying a balancing test, we find that the state's interest in maintaining compliance with the Reporting Act is insufficient to justify the burden placed on interstate commerce by *N.J.S.A.* 14A:13-20b. Without the right to enforce contracts made in interstate commerce, the right to engage in such commerce is severely restricted. This stiff sanction applies without regard to whether the corporation is actually liable for any tax. Moreover, the penalty (the value of the lost cause of action) may be completely disproportionate to any tax that might be due. In

addition, the statute gives a windfall to defendants that they can exploint for their own economic advantage.[8]

However, the unconstitutnonality of the enforcement provision as written does not require us to invalidate the entire Reporting Act or leave the Reporting Act without any enforcement provision. Where part of a statute is unconstitutional, "a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health." *Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 104 (1983) (citing *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Com'n*, 82 *N.J.* 57, 75 (1980)); *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350, 357 (1975), app. dism., 426 *U.S.* 901, 96 *S.Ct.* 2220, 48 *L.Ed.*2d 826 (1976); *State v. DeSantis*, 65 *N.J.* 462, 472-73 (1974)). The relevant issue in each case is whether the Legislature would want the statute to survive. *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, supra*, 82 *N.J.* at 75. This inquiry does not turn "simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover . . . [T]he

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[8]The concurring and dissenting opinion of Wilentz, C.J., finds this reason for invalidating *N.J.S.A.* 14A:13-20b unpersuasive because "[i]n numerous contexts, the law permits private litigants to come away with a 'windfall' if doing so is the only or the most effective way of assuring that an important public interest is served." *Post* at — (slip op. at 16-17). The opinion points to "[s]tatutes and common-law rules permitting plaintiffs to collect treble or punitive damages against malefactors . . . ." *Post* at — (slip op. at 16). We do not believe that the policy of awarding treble or punitive damages to certain innocent plaintiffs in order to encourage them to bring wrongdoers to justice, justifies allowing malefactors to escape liability for their wrongdoing because of the fortuity that their victims failed to comply with the Reporting Act.

sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb." *Id.* (*quoting Schmoll v. Creecy*, 54 *N.J.* 194, 202 (1969).

We believe that the state's interest in enforcing the Reporting Act is adequately served by a provision that prohibits a corporation from using state courts until such time as the corporation files an Activities Report and the provisions of *N.J.S.A.* 14A:13-20c(2) are met.[9] This allows the corporation to enforce all its contracts and will force the corporation to provide the information the state needs to determine the corporation's tax liability. Admittedly, this enforcement provision is not as effective as *N.J.S.A.* 14A:13-20b because it will force compliance with the Reporting Act only after a corporation decides to bring a lawsuit in New Jersey courts. Nonetheless, we are convinced that due to the importance of the Reporting Act in enforcing the Tax Act, the Legislature would prefer this modified enforcement provision over the absence of an enforcement provision.[10] The conclusion that the Legislature

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[9]*N.J.S.A.* 14A:13-20c(2) provides:

> all taxes, interest and civil penalties due the State for all periods have been paid, or provided for by adequate security or bond approved by the director, before the suit may proceed.

[10]The concurring and dissenting opinion of Wilentz, C.J., asserts that we have "effectively eliminated any sanction for noncompliance" with the Reporting Act. *Post* at — (slip op. at 16). It suggests that as a result of our decision foreign corporations will comply only where the cost of compliance (paying taxes) exceeds the value of the last cause of action. *Post* at — (slip op. at 16). "This will mean that only those foreign corporations which happen to have a need to use the New Jersey courts

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would not view *N.J.S.A.* 14A:13-20b as an indispensible part of the Reporting Act is supported by the severability clause contained in *N.J.S.A.* 14A:13-23.

Accordingly, we conclude that to preserve the constitutionality of *N.J.S.A.* 14A:13-20b, the statute shall be interpreted to mean that a foreign corporation can pursue a cause of action in this state after filing an Activities Report and meeting the conditions of *N.J.S.A.* 14A:13-20c(2), regardless of whether the Report was filed in the same accounting period in which the cause of action arose. As one commentator has explained with respect to sanctions for violation of qualification statute, this approach is not as effective as a permanent retroactive bar to the courts but is "preferred because it provides effective enforcement and yet is fair to the corporation." Note Corporate Qualification Statutes, 63 *Colum. L. Rev.* 117, 130 (1963).[11] If the Legislature wishes to increase the deterrent effect of the Act, it may wish to amend the Act to also provide reasonable monetary penalties. *See id.* ("The need for deter-

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(or which have an uncharacteristic commitment to the rule of law) will end up supplying the Activities Report requested by the statute. It is hardly fair that compliance with the Act should turn on such a fortuity." *Post* at — (slip op. at 16).

We find this argument unpersuasive because the effectiveness of the Reporting Act even as written depends upon this type of fortuity. Even under the concurring and dissenting opinion, a corporation will comply with the Reporting Act only if it concludes that the probable value of the causes of action it is likely to have in New Jersey courts exceeds the taxes that the corporation is likely to owe.

[11]Of course, any foreign corporation that meets the exceptions set forth in *N.J.S.A.* 14A:13-20c(1) and (2) likewise may maintain a suit in New Jersey.

rence man be met by a companion provision imposing monetary penalties.")

V

Defendants also assert that the Reporting Act violates the supremacy clause because it frustrates the goals of the National Housing Act, 12 *U.S.C.A.* §§ 1701-1750g. Defendants argue that the burden of filing an Activities Report and the application of 14A:13-20 to disable a mortgagee from foreclosing on a mortgage in default will discourage lenders from making mortgage loans in New Jersey.

A state statute violates the supremacy clause

(1) where "Congress has either explicitly or implicitly declared that the states are prohibited from regulating" in this area, *Ray v. Atlantic Richfield Co.*, 435 *U.S.* 151, 157, 98 *S.Ct.* 988, 994, 55 *L.Ed.*2d 179 (1978) or (2) where a state statute "actually conflicts with a valid federal statute." *Id.* at 158, 98 *S.Ct.* at 994. [*McGlynn v. N.J. Public Broadcast Auth.*, 88 *N.J.* 112, 137 (1981).]

Since defendants have not alleged that Congress has prohibited the states from regulating in this area, we must consider only whether the Reporting Act "actually conflicts with a valid federal statute."

The test for determining whether actual conflict exists is "whether, under the circumstances of [a] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 *U.S.* 52, 67, 61 *S.Ct.* 399, 404, 85 *L.Ed.* 581 (1941), quoted in *Jones v. Rath Packing Co.*, 430 *U.S.* 519, 526, 97 *S.Ct.* 1305, 1310, 51 *L.Ed.*2d 604 (1977). *McGlynn v. N.J. Public Broadcast Auth., supra*, 88 *N.J.* at 137.]

The purpose of the National Housing Act is "to establish secondary market facilities for home mortgages," 12 *U.S.C.A.* § 1716, and "to promote private activity in the building of low and moderate income housing through the use of federal credit," *United States v. Winthrop Towers*, 542 *F.Supp.* 1042, 1044 (N.D. Ill. 1982). We see nothing in the Reporting Act, as modified in Section III of our opinion, that frustrates these goals. We do not think that compliance with the Reporting Act is so burdensome that lenders will shun the New Jersey mortgage market. Accordingly, we hold that the Reporting Act does not violate the supremacy clause.

As modified, we affirm the judgment of the Appellate Division.

Justices Pollock and Stein join in this opinion. Chief Justice Wilentz has filed a separate opinion concurring in part and dissenting in part, in which Justice O'Hern joins. Justice Handler, has filed a separate dissenting opinion, in which Justice Clifford joins.

SUPREME COURT OF NEW JERSEY
A-39 September Term 1986

FIRST FAMILY MORTGAGE
CORPORATION OF FLORIDA,

Plaintiff-Appellant,

v.

LINDA A. DURHAM and
MR. LINDA DURHAM,

Defendants,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

WILENTZ, C.J., concurring and dissenting.

In *Avco Financial Services Consumer Discount Co. One v. Director, Division of Taxation*, 100 *N.J.* 27 (1985), we upheld this State's constitutional power to tax foreign corporations that derive income from sources within New Jersey. Today, the Court effectively deprives state officials of their most important means of assuring that the taxes which we said in *Avco* can be imposed in fact will be imposed. In the name of interstate commerce, the plurality has drained all effectiveness out of the Corporation Business Activities Reporting Act, reducing that statute to a supplication. Unable to agree that this anomalous result is consistent with the underlying purposes and judicial interpretation of the dormant commerce clause, I dissent.[1]

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[1] I concur in the plurality's disposition, in Part V of its opinion, of plaintiff's supremacy clause argument.

I.

The plurality opinion correctly frames the threshold doctrinal inquiry: whether the Reporting Act amounts to a *per se* violation of the commerce clause or whether it is to be judged under the balancing test laid down by the United States Supreme Court for state regulations having a legitimate nondiscriminatory purpose. *See Coons v. American Honda Motor Co.*, 94 *N.J.* 307, 316-17 (1983), *cert.* den., 469 *U.S.* 1123, 83 *L.Ed.*2d 800 (1985). And the plurality opinion correctly decides that the more accommodating balancing test applies. As explained *infra* at—(slip op. at 14-23), I disagree with the plurality's application of that test to the statute challenged here. But before entering into that discussion, I want to spell out my reasons, which are somewhat different from the plurality's, for concluding that the balancing test should apply, that is, for concluding that a state's closing of its courthouse doors to a foreign corporation that refuses to comply with its legitimate regulations does not automatically transgress the dormant commerce clause.

At the heart of the dormant commerce clause lies a deep-seated concern over states adopting policies of economic protectionism-policies designed to enhance the welfare of one state's own economy at the expense of the economies of other states. The Supreme Court has translated this concern into law by reading into Congress' power to regulate interstate commerce, conferred by Article I, Section 8, Clause 3 of the Constitution, an *exclusive* power in certain matters off-limits to state encroachment, at least without congressional authorization. In giving a strong voice to this silent prohibition, the Court has recognized

that the nation's political unity and economic prosperity depend on a vibrant commercial intercourse across state boundaries and that discriminatory or protectionist state legislation poses a substantial threat to those vital national interests. *See generally H.P. Hood & Sons, Inc. v. Du Mond*, 336 *U.S.* 525, 93 *L.Ed.* 864 (1949); Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," 84 *Mich. L. Rev.* 1091, 1110-25 (1986); Smith, "State Discriminations Against Interstate Commerce," 74 *Calif. L. Rev.* 1203, 1206-10 (1986).

This anti-discrimination or anti-protectionism principle not only justifies the Court's exercise of its power to invalidate state legislation affecting interstate commerce but also, in large measure, circumscribes that power. "[N]ot every exercise of state authority imposing some burden on the free flow of commerce is invalid." *Hunt v. Washington State Apple Advertising Comm'n*, 432 *U.S.* 333, 349, 53 *L.Ed.*2d 383, 398 (1977). Nondiscriminatory state regulations that advance some legitimate local interest have generally been sustained. Regan, *supra*, 84 *Mich. L. Rev.* at 1092; Smith, *supra*, 74 *Calif. L. Rev.* at 1204. Thus, whereas state legislation motivated by "simple economic protectionism" is subject to "a virtually per se rule of invalidity," *City of Philadelphia v. New Jersey*, 437 *U.S.* 617, 624, 57 *L.Ed.*2d 475, 481 (1978), "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142, 25 *L.Ed.*2d 174, 178 (1970).

No contention has been, or could be, made in this case that the statute challenged by plaintiff is motivated by "economic protectionism." It is true that the Reporting Act has the effect of benefiting in-state economic actors and disadvantaging out-of-state corporations. But this is not the reason for its existence. Rather, in adopting the Reporting Act the Legislature was seeking only to provide tax authorities with the means of discovering foreign corporations falling within the ambit of the Corporation Income Tax Act (CITA), *N.J.S.A.* 54:10E-1 to -24, which assesses a tax on income derived from sources within New Jersey. *See* 5 *Report of the New Jersey Tax Policy Committee* 33 (1972) *(Report)*. CITA itself is a wholly legitimate attempt to impose taxes on value earned by foreign corporations from inside New Jersey bearing a fiscal relation to the protection, opportunities and benefits New Jersey affords these corporations. *Avco Fin. Servs. Consumer Discount Co. One v. Director, Div. of Taxation, supra,* 100 *N.J.* 27; *see ASARCO Inc. v. Idaho State Tax Comm'n,* 458 *U.S.* 307, 315, 73 *L.Ed.*2d 787, 794 (1982). "[E]quity demands"—and as we held in *Avco,* the commerce clause permits—that "business carrying on activities in the State and exploiting the New Jersey market make some contribution to the costs of maintaining governmental operations and the services provided by the State . . . ." *Report, supra,* at 22. The fact that the Reporting Act, like the CITA, may have some incidental protectionist *effect* does not make it unconstitutional; protectionist *purpose* is what the commerce clause forbids. Regan, *supra,* 84 *Mich. L. Rev.* 1091.

Moreover, the Reporting Act does not discriminate between domestic and foreign corporations. Domestic cor-

porations are also required to file tax returns providing information about their business activities subject to taxation, *see N.J.S.A.* 54:10A-14(b), -18, and are subject to various sanctions, including forfeiture of the corporate charter, for failure to pay taxes or file returns, *see N.J.S.A.* 54:10A-17, -22.

Against this backdrop, the Supreme Court cases most relevant in this case, the so-called "forced-licensure" decisions, have been viewed as somewhat puzzling, for they apply a *per se* rule of invalidity even though no state protectionism or discrimination appears to be involved. *See* Regan, *supra*, 84 *Mich. L. Rev.* at 1182, 1188-89. This line of cases invalidates state qualification statutes that force foreign corporations engaged in interstate commerce to register with the state on pain of losing access to the state's courts. *See Allenberg Cotton Co. v. Pittman*, 419 *U.S.* 20, 42 *L.Ed.*2d 195 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 *U.S.* 282, 66 *L.Ed.* 239 (1921); *Sioux Remedy Co. v. Cope*, 235 *U.S.* 197, 59 *L.Ed.* 193 (1914); *Buck Stove & Range Co. v. Vickers*, 226 *U.S.* 205, 57 *L.Ed.* 189 (1912); *International Text-Book Co. v. Pigg*, 217 *U.S.* 91, 54 *L.Ed.* 678 (1910).

The plurality distinguishes the forced-licensure decisions on the basis of various factual differences tending to minimize the Reporting Act's burden in comparison to that of the invalidated qualification statutes. But the plurality does not satisfactorily explain the relevance or importance of these distinctions, nor answer the dissenting opinion's contention that the damning feature of the forced-licensure statutes is their sanction barring a foreign corporation from enforcing contracts made in inter-

state commerce. This latter defect is particularly surprising given the plurality's subsequent strong emphasis, in the part of its opinion applying the balancing test, on the severity of the Act's door-closing sanction.

Were our task strictly one of determining how to achieve literal conformance to the Supreme Court's *statements*—as distinguished from its holdings—on this subject, I might agree with the dissenting opinion's conclusion that the *per se* rule applies here. Undeniably, the Court's forced-licensure opinions contain language strongly suggesting that states must keep open their courthouse doors to those seeking to enforce interstate contracts.[2] Absent a clear holding to this effect, however, our inquiry must proceed further, to the wisdom of such a rule. And we should be most reluctant to take language to what admittedly may be its logical extreme where, as here, the consequence is to deprive the state of its power to do that which seems to offend no constitutional value or policy. Our ultimate responsibility is to arrive at a considered judgment as to how the Supreme Court, if faced with the question, would rule. I simply cannot believe the Supreme Court would hold that the dormant commerce clause re-

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[2] Of special interest are Justice Douglas' conclusion in *Allenberg Cotton Co. v. Pittman, supra,* 419 *U.S.* at 34, 42 *L.Ed.* 2d at 206, that "Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause," and Justice Rehnquist's statement in his dissenting opinion in that case, implicitly rejected by the majority, that "our decisions hold that the burden imposed on interstate commerce by [qualification] statutes is to be judged with reference to the measures required to comply with such legislation, and not to the sanctions imposed for violation of it," *id.* at 42-43, 42 *L.Ed.*2d at 211.

quires us to invalidate an otherwise unobjectionable state regulation merely because it has the effect of rendering unenforceable a contract made in interstate commerce.

In circumstances such as these, we should ask whether there is an alternative interpretation of the case law that satisfies our obligation as an inferior tribunal on federal questions without sacrificing our convictions about what the Constitution means. I believe such an interpretation exists in this case.

In my view, the Supreme Court's forced-licensure decisions are properly read as focusing not on the severity of the door-closing sanction but on the illegitimacy of the underlying regulation to which the sanction attaches. The constitutional defect in the qualification statutes—and the key distinguishing factor between those statutes and the Reporting Act—is that the regulatory end they sought to achieve was invalid. By the time of these decisions, the principle had already been well-established that a state cannot require a foreign corporation to take out a doing-business license when in fact that corporation was not doing business in the state but was engaged solely in interstate commerce. *See, e.g., Crutcher v. Kentucky*, 141 *U.S.* 47, 58, 35 *L.Ed.* 649, 652 (1891) (vacating criminal conviction imposed on agent of interstate corporation for failure to register before doing business in state). When the Court first struck down a statute with a door-closing sanction in *International Text-Book Co. v. Pigg, supra*, 217 *U.S.* 91, 54 *L.Ed.* 678, it was reacting not to the sanction but to the illegitimacy of the underlying regulation, and simply applied the previously established rule forbidding such attempts at licensing foreign corporations. *See id.*

at 108-10, 54 *L.Ed.* at 686-87 (relying on *Crutcher v. Kentucky, supra*); *Buck Stove & Range Co. v. Vickers, supra*, 226 *U.S.* at 215, 57 *L.Ed.* at 192 (*Pigg* did not "announce [ ]any new doctrine . . ., it but reiterated and applied principles which were already well recognized").

This view of the forced-licensure cases was advanced by the majority opinion of this Court in *Coons v. American Honda Motor Co., supra*, 94 *N.J.* 307. In *Coons* this Court invalidated a provision tolling the statute of limitations in actions against foreign corporations engaged solely in interstate commerce that had not obtained a certificate to do business in New Jersey. We quite properly declined to attach talismanic significance to the door-closing sanction involved in the *Pigg* line of cases. Those cases, we said, "focused on the importance of leaving interstate commerce unfettered. As applied to this case that principle gives rise to the question whether the denial of the statute of limitations defense to unlicensed foreign corporations *impermissibly*—even though indirectly—forces those corporations to obtain a license to do business in the state." *Id.* at 318 (emphasis added). It was this impermissible regulatory objective, not the sanction, that triggered the condemnation of the dormant commerce clause. "The legislature cannot accomplish indirectly that which it could not do directly. . . ." *Id.*

That the Supreme Court does not view application of a door-closing sanction against a foreign corporation to be a *per se* burden on interstate commerce is made clear by its decisions in *Eli-Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 *U.S.* 276, 6 *L.Ed.*2d 288 (1961), and *Union Brokerage Co. v. Jensen*, 322 *U.S.* 202, 88 *L.Ed.* 1227 (1944). In

those cases, the Court held that the commerce clause allows a state to deny a foreign corporation access to the state's courts for failure to comply with a qualification statute if the corporation, although also engaged in interstate commerce, does a sufficient amount of intrastate business. What made these door-closing sanctions constitutional was the propriety of the regulation itself. *See* L. Tribe, *American Constitutional Law* § 6-12, at 341 (1978) (*Eli Lilly* held that "New Jersey could properly require this multi-state drug company to obtain a certificate prior to doing local business there, and that [the company]—having failed to obtain such a certificate—could be barred from suing for breach of contract in New Jersey courts").[3]

Why is it impermissible—more specifically, why is it a violation of the commerce clause—for a state to force a foreign corporation exclusively engaged in interstate commerce to qualify to do business in the state? As previously mentioned, such qualification statutes do not necessarily discriminate in favor of the state's own corporations. The cases themselevs do not provide a clear answer, but one commentator has offered a plausible explanation: the statutes condemned in *Allenberg Cotton* and its predecessors disadvantage interstate commerce "as such." That is, "a

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[3] While the causes of action barred in *Eli Lilly* and *Jensen* did not seek to enforce an interstate contract, I do not believe the result would have been different if they had. The critical factor is the legitimacy of the regulation itself. Whereas the commerce clause prohibits states from licensing foreign corporations engaged solely in interstate commerce, "that Clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments." *Union Brokerage Co. v. Jensen, supra,* 322 *U.S.* at 212, 88 *L.Ed.* at 1233-34. The statute challenged in this case does no more than that.

proliferation of qualification-to-do business requirements applied to firms with minimal local contacts could have effect . . . of disadvantaging interstate commerce just because such commerce straddles political boundaries." Regan, *supra*, 84 *Mich L. Rev.* at 1189. Corporations should not, merely by virtue of engaging in interstate commerce, give up their control over their amenability to jurisdiction in foreign states or over the disclosure of important financial information. The qualification statutes forced foreign corporations to do precisely that, and hence penalized those corporations solely because they were engaged in interstate commerce.

New Jersey's Reporting Act has no such effect. "[W]e have not here a case of [a] foreign corporation merely coming into [New Jersey] to contribute to or to conclude a unitary interstate transaction, nor of the State's withholding 'the right to sue even in a single instance until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there.' " *Union Brokerage Co. v. Jensen*, *supra*, 322 *U.S.* at 211, 88 *L.Ed.* at 1233 (citations omitted). While not localizing its activities in New Jersey to such an extent that it could be said to be doing business here, the typical foreign corporation subject to the Act will have voluntarily structured its activities in such a way as to be subject to taxation under CITA.[4] The Reporting Act does not disadvantage inter-

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[4] Or, at the least, the foreign corporation will have derived sufficient revenues from New Jersey so as to be subject to the reporting requirement, even if its contacts fall short of the constitutional minimum necessary to justify an exercise of the

(Continued on following page)

state commerce "as such." Unlike the qualification statutes, it does not "accomplish indirectly that which it could not do directly;" its regulatory objective is totally permissible. Accordingly, the *per se* rule of invalidity created in the forced-licensure cases does not apply. The fact that the sanction the Act applies for a violation of its regulation may have the effect of rendering unenforceable a contract made in interstate commerce is not salient.

II.

In the portion of its opinion declaring the inapplicability of the *per se* rule, the plurality acknowledges that without the Reporting Act, the Director "would find it almost impossible" to determine which corporations were subject to CITA; that compliance with CITA would become largely voluntary; and that such a result "would deprive the state of revenue, be unfair to those corporations that comply voluntarily, and give an unfair advantage to these corporations that avoid the tax." *Ante* at — (slip op. at 15).

Yet it is precisely this calamitous state of affairs that the plurality has brought on as a result of its application

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(Continued from previous page)

state's taxing power. This may be the case with plaintiff here. *See Chemical Realty Corp. v. Taxation Div. Director*, 5 N.J. Tax 581, 605-16 (1983). The issue has not been briefed or argued, however, and so we have no way of knowing its proper resolution. The analysis set forth in this opinion proceeds on the assumption that plaintiff is the typical foreign corporation, *i.e.*, one whose connection with New Jersey is sufficient to justify the imposition of the CITA tax. But even if plaintiff were not subject to taxation, this would not necessarily mean that it would also be constitutionally immune from application of the reporting requirement, which imposes a lesser burden and hence arguably may be triggered by a lesser quantum of forum contacts. This issue, too, is not before us.

of the balancing test. The plurality's "modification" of the Reporting Act—allowing a corporation to proceed with its cause of action so long as it files an Activities Report and satisfies the conditions of *N.J.S.A.* 14A:13-20c(2), regardless of whether the Report was filed in the same accounting period as the cause of action—means that for the vast majority of foreign corporations, compliance with the Reporting Act, and hence with CITA (violations of which, according to the plurality, are "almost impossible" to discover without the Reporting Act), will be voluntary. I cannot agree that the commerce clause mandates such an absurdity.

The plurality advances two reasons in support of its conclusion that the state interest in assuring compliance with the Reporting Act is insufficient to justify the burden placed on interstate commerce by the door-closing sanction. First, "the penalty (the value of the lost cause of action) may be completely disproportionate to any tax that might be due"; second, "the statute gives a windfall to defendants that they can exploit for their own economic advantage."[5] *Ante* at — (slip op. at 16-17). Neither of these arguments comes close to establishing a constitutional defect.

The claim that "the penalty . . . may be disproportionate to any tax that might be due" is unconvincing for sev-

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[5] The plurality also criticizes the sanction for applying without regard to whether a foreign corporation is actually liable for any tax. The point is a negligible one. As the plurality itself notes, "the reporting requirement is carefully limited to those corporations that satisfy any of the conditions cited in *N.J.S.A.* 14A:13-15, and are therefore likely to owe a tax." *Ante* at — (slip op. at 13).

eral reasons. First, this claim mistakenly assumes that what is being penalized is the failure to pay tax. That is not true; what is being penalized is the failure to comply with the statute, *i.e.*, to file a Business Activities Report. Thus, each violator has committed precisely the same offense, and it is erroneous for the plurality to assume that the amount of unpaid taxes should influence the question of "proportionality."

This is not to deny that there is still a measure of disproportionality caused by the fact that the values of causes of action vary. The plurality neglects to point out, however, that the Act *does* make one important attempt to fit the penalty to the offense. The Act excuses noncompliance at the time of suit if the foreign corporation subsequently complies and if the initial failure to file "was done in ignorance of the requirement to file, [and] such ignorance was reasonable in all circumstances." *N.J.S.A.* 14A:13-20c. In effect, therefore, the Act's "stiff sanction" applies only to what could be called "willful" violators, *i.e.*, those who had knowledge of the filing requirement. Non-willful violators are given the opportunity to avoid the sanction.

The only substantive change effected by the plurality's rewriting of the Act's enforcement mechanism, therefore, is to give willful violators the same opportunity as non-willful violators to avoid the sanction. The plurality does not say the sanction cannot be used at all; it permits the sanction to be used where a foreign corporation continues to fail to file an Activities Report and pay its taxes even after filing suit. Presumably a foreign corporation would adopt this course of action (continuing to fail to comply) where the cost of compliance (paying taxes) exceeded the value of the lost cause of action; indeed it would choose not

to file the suit at all, lest the New Jersey authorities discover its existence. That strategizing will indeed lead to a greater measure of "proportionality" between the amount of the penalty and the amount of the cause of action, but it is difficult to see how the plurality's scheme is any more fundamentally fair, much less constitutionally required. Indeed, the plurality's change creates its own unfairness, stemming from the fact that it has left intact the Act's "requirement" but effectively eliminated any sanction for noncompliance. This will mean that only those foreign corporations that happen to have a need to use the New Jersey courts (or that have an uncharacteristic commitment to the rule of law) will end up supplying the Activities Report and paying taxes. It is hardly fair that compliance with the Act should turn on such a fortuity.[6]

The plurality's second criticism of the door-closing sanction—that it bestows a "windfall" on undeserving defendants—is even less persuasive. In numerous contexts, the law permits private litigants to come away with a "windfall" if doing so is the only or the most effective way of assuring that an important public interest is served. Statutes and common-law rules permitting plaintiffs to

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[6] The plurality finds its enforcement scheme analogous to that contained in the Act as written, under which a corporation could similarly calculate that the cost of compliance exceeded the value of its anticipated causes of action in New Jersey. *Ante* at — n.10 (slip op. at 19 n.10). This substitutes analogy for analysis. The real question, of course, is the *probability* of compliance. The answer to that question is that it is exceedingly more probable that a foreign corporation would choose to comply if forced to make its decision in advance of the accrual of its causes of action—when it cannot be sure of the likelihood or magnitude of its potential loss—than if allowed to postpone making its decision until after an actual cause of action has arisen.

collect treble or punitive damages against malefactors, particularly corporate malefactors, who would otherwise likely go unpunished by the criminal justice system, are prime examples. Defendants who claim that a plaintiff-foreign corporation has failed to file an Activities Report perform exactly the same function.

But more fundamentally, the plurality's insistence on proportionality and concern with windfalls seem decidedly misplaced in this context. The plurality opinion fails to consider the practical fact that undoubtedly drove the Legislature to adopt the unusual and admittedly inexact remedy of denying access to court: the absence of any effective alternative remedies. The principal alternative, fines, is likely to have little deterrent value. The genius of the door-losing sanction is that it allows the State to rely on the threat of private litigants raising noncompliance as a defense to induce foreign corporations to comply, eliminating the need for expensive enforcement machinery designed to detect violations. Moreover, a foreign corporation engaged solely in interstate business by definition has no office, bank accounts or other assets in the forum state readily subject to attachment. This means that New Jersey authorities seeking to collect judgment against a recalcitrant foreign corporation will have to undergo the expense of instituting legal proceedings in foreign jurisdictions.

The plurality's substitute remedy, of course, does not even include a provision for fines. The plurality's assertion that under its remedy "the state's interest in enforcing the Reporting Act is adequately served," *ante* at — (slip op. at 18), simply flies in the face of reality. In support of its approach, the plurality opinion quotes a law review

note as stating that "this approach is not as effective as a permanent retroactive bar to the courts but is 'preferred because it provides an effective enforcement and yet is fair to the corporation.' " *Ante* at — (slip op. at 19-20) (quoting Note, "Sanctions for Failure to Comply with Corporation Qualification Statutes: An Evaluation," 63 *Colum. L. Rev.* 117, 130 (1963)). That Note, however, goes on to recognize what the plurality does not, namely, that such an approach is incomplete unless "[t]he need for deterrence" is "met by a companion provision imposing monetary penalties." 63 *Colum. L. Rev.* at 130. The Act does not have such a companion penalty provision, and it is clear that the author of the Note thought such a provision indispensable to effective deterrence. In fact, the Note strongly criticizes statutory schemes embracing the plurality's approach. "[T]hose statutes requiring payment only of past fees and taxes accruing while the corporation has illegally done business . . . lack sufficient deterrent value to be effective. Clearly, the benefits inuring to the corporation that has not qualified would encourage the continued illegal transaction of business until the violation is discovered." *Id.* at 122.[7]

Under the Supreme Court's commerce clause balancing test, one important consideration is "whether alternative

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[7] Even if the Act did have a provision for fines, reliance on the Columbia Note for the proposition that fines could meet the need for deterrence would be misplaced. The Note deals with statutes requiring qualification as a condition for "doing business" within a state (*i.e.*, conducting intrastate business). The statute at issue in this case deals with corporations engaged solely in interstate commerce. As previously noted, such corporations, unlike foreign corporations doing business within a state, will not have assets within the state and therefore will not be as effectively deterred by the prospect of fines.

means could promote [the] local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma,* 441 *U.S.* 322, 336, 60 *L.Ed.*2d 250, 262 (1979). The plurality has failed to take this consideration into account here. It is reasonably clear that no alternative means besides the door-closing sanction could as well serve the state interest in assuring compliance with the Reporting Act.

Finally, the plurality gives insufficient consideration to the important state interest advanced by the Reporting Act and the door-closing sanction: assuring that foreign corporations pay their fair share of taxes for income they derive from New Jersey residents. "[T]axes are the lifeblood of government, the vital force needed to sustain the public interest." *City of Philadelphia v. Austin,* 86 *N.J.* 55, 65 (1981). "When one taxpayer fails to bear his or her fair share, the burden becomes heavier on other taxpayers." *Id.* This will certainly be one result of the rampant tax evasion unleashed by the Court's decision today. Yet the plurality reaches its conclusion that the sanction is unconstitutional without even mentioning this basic state interest.

In sum, the plurality's balancing analysis is unbalanced. It greatly exaggerates the "unfairness" of the "burden" imposed by the door-closing sanction on interstate commerce; ignores the unavailability of effective alternative sanctions; and neglects the undeniable importance of the state's interest in assuring that each taxpayer pays its fair share of taxes. In my view the plurality's crippling of the Reporting Act amounts to a need-

less overturning of a perfectly reasonable, and perfectly constitutional, legislative judgment.

III.

In a recent opinion, Justice Scalia warned of the hazards inherent in the judicial enterprise of determining, under the dormant commerce clause balancing test, whether a statute's local benefits are "outweighed" by its impact on interstate commerce. *See CTS Corp. v. Dynamics Corp.*, — *U.S.* —, —, 95 *L.Ed.*2d 67, 89 (1987) (Scalia, Jr., concurring). "[S]uch an inquiry," Justice Scalia wrote, "is ill suited to the judicial function and should be undertaken rarely if at all." *Id.* Today's decision provides sobering confirmation of Justice Scalia's thesis. Although I am not prepared to agree that balancing lacks any appropriate role in commerce clause adjudication, it is clear to me that, if and when done, balancing should be performed with far more care and with far more sensitivity to the Legislature's policy determinations than the plurality has exhibited here. "[A] court should not [invalidate state legislation under the dormant commerce clause] merely because it believes it to be in the public interest to determine policy where Congress has not." *Continental Trailways, Inc. v. Director, Div. of Motor Vehicles*, 102 *N.J.* 526, 553 (1986) (O'Hern, J., dissenting). Because the plurality appears to have done just that in this case, producing a remedy that is no remedy at all, I respectfully dissent.

Justice O'Hern joins in this opinion.

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SUPREME COURT OF NEW JERSEY
A-39 September Term 1986

FIRST FAMILY MORTGAGE
CORPORATION OF FLORIDA,

Plaintiff-Appellant

v.

LINDA A. DURHAM and
MR. LINDA DURHAM,

Defendants,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

HANDLER, J., dissenting.

First Family Mortgage Corporation of Florida (First Family) is a Florida corporation whose principal place of business is in Illinois. First Family has no offices, employees, salespersons, or representatives in New Jersey. It has neither received a certificate of authority to transact business in the State, *N.J.S.A.* 14A:13-3, nor filed a notice of business activities within the state, *N.J.S.A.* 14A:13-15.

First Family invests in and services FHA and VA guaranteed mortgages and acts as a servicing custodian for the Government National Mortgage Association (GNMA) loans, 24 *C.F.R.* § 390. It does not originate loans in the state, but it does acquire in the secondary mortgage market[1] loans secured by New Jersey real estate. The mortgage

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[1] The secondary market involves transfers of loans to permanent investors, which may then be combined into GNMA mortgagee-backed securities to be sold in shares to customers.

loan in this case was made by Provident Mortgage Corporation to Linda Durham for a house in Camden County. The loan was VA guaranteed and part of a GNMA grouping[2] of 68 loans that were sold through Mid States Mortgage and Service Company, an Illinois corporation, to First Family.

In January 1983, Durham defaulted on her mortgage. In July 1983, First Family moved in the Camden County Superior Court, Chancery Division, to foreclose. In May 1985, the trial court dismissed First Family's complaint because of First Family's failure to file a notice of business activities within the state.

The Corporate Business Activities Reporting Act (Act or Reporting Act), *N.J.S.A.* 14A:13-14 to -23, requires foreign corporations not authorized to do business in the state, but which have any of seven listed connections with the state, to file a notice of business activities report. The Act applied to First Family because it received payments totaling over $25,000 from persons residing in the state. *N.J.S.A.* 14A:13-15(e). These payments came in the form of payments on federally guaranteed home mortgages First Family acquired in the secondary mortgage market. Failure to comply with the Reporting Act disables the violating corporation from using state courts to enforce its contracts. *N.J.S.A.* 14A:13-20(b).

> The Corporation Business Activities Reporting Act is essentially an information gathering measure. Its clear purpose is to enable the Division of Taxation to obtain pertinent data from any foreign corporation

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[2] See note 1.

> which carries on an activity in the State but which has not obtained a certificate of authority to do business in New Jersey, to the end that a proper determination may be made as to whether such corporation is subject to any State tax.
>
> [*Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J. Super.* 358, 362 (App. Div. 1977).]

"This Notice requirement, coupled with appropriate sanctions, is designed to strengthen the enforcement of the State's corporation tax laws." 5 *Report of the New Jersey Tax Policy Committee* 34 (1972).

First Family admits the applicability to it of the Reporting Act but challenges the Act's constitutionality under the negative implications of the commerce clause of the federal constitution (the "dormant commerce clause"), U.S. Const. art I, § 8.[3] The trial court expressed doubts as to the constitutionality of the Act, but felt compelled by an earlier Appellate Division decision, *Associates Consumer Discount Co. v. Bozzarello, supra*, 149 *N.J. Super.* 358, to uphold the validity of the Act. The Appellate Division upheld the dismissal. *First Family Mortg. Corp. of Florida v. Durham*, 205 *N.J. Super.* 251 (App. Div. 1985). It rejected the commerce clause challenge, noting that the reporting requirement, unlike a licensing requirement, does "not require a foreign corporation engaged solely in inter-

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[3] First Family also challenged the Act under the supremacy clause of the federal constitution, arguing that the Act is in conflict with the National Housing Act. The claim was rejected by the trial court and by the Appellate Division. *First Family Mortg. Corp. of Florida v. Durham*, 205 *N.J. Super.* 251, 255 (App. Div. 1985). Because of how I would decide the commerce clause claim, I would not reach First Family's supremacy clause claim.

state commerce to consent to being sued in that state as the price of doing business there." *Id.* at 255.

The plurality agrees with the Appellate Division that the Reporting Act, at least as modified, does not violate the commerce clause. The plurality reasons that since the reporting requirement is a minimal and reasonable requirement, it cannot be characterized as an unconstitutional burden on interstate commerce. The plurality's mistake is that it emphasizes the nature and severity of the Act's requirement rather than the nature and severity of the Act's sanctions. Its approach is contrary to the approach mandated by the United States Supreme Court in similar cases. In its elaboration of the dormant commerce clause, the Supreme Court has developed the following doctrines: that 1) the ability to use state courts to enforce interstate transactions is an integral part of interstate commerce and, therefore, 2) states cannot close access to their courts to corporations acting solely within interstate commerce.

In *Sioux Remedy Co. v. Cope*, 235 *U.S.* 197, 59 *L.Ed.* 193 (1914), the Supreme Court invalidated under the commerce clause a South Dakota statute that closed its state courts to foreign corporations that did not file a copy of their charter, appoint an agent for service of process, and pay a filing fee. The Court first noted "that the right to demand and enforce payment for goods sold in interstate commerce, if not a part of such commerce, is so directly connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce." *Id.* at 202-03, 59 *L.Ed.* at 197. The Court found the conditions to be unreasonable

because they had no relation to the costs or procedures of a court trial.[4]. *Id.* at 204-05, 59 *L.Ed.* at 198.

In *Dahnke-Walker Miller Co. v. Bondurant*, 257 *U.S.* 282, 66 *L.Ed.* 239 (1921), the Supreme Court invalidated under the commerce clause an application of a Kentucky statute to a contract-enforcement suit brought by a foreign corporation. The corporation had sought to enforce a transaction that was completely within interstate commerce.[5] Kentucky's statute prescribed the conditions on which foreign corporations could do business in the state. Because the corporation had not complied with the statute, verdict was directed against it on its suit.

The Court concluded: "A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs

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[4] The Court found the conditions to be unreasonable also because they would subject the foreign corporations to suit in the enforcing state. *Sioux Remedy, supra,* 235 *U.S.* at 205, 59 *L.Ed.* at 198. The Appellate Division put great emphasis on the fact that the Reporting Act does not subject foreign corporations to suit within the state. *First Family Mortg., supra,* 205 *N.J. Super.* at 255. However, the more recent United States Supreme Court rulings invalidating court-closing statutes, discussed below, did not rely on whether the statutes did or did not subject the foreign corporations to suit within the enforcing state.

[5] Because this case involves an appeal from a summary judgment, we must accept First Family's assertion that it is not engaged in intrastate business activities within the state.

A state has substantially greater discretion in its treatment of foreign corporations if the corporations' activities are localized or intrastate. *See Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 *U.S.* 276, 6 *L.Ed.*2d 288 (1961); *Union Brokerage Co. v. Jensen*, 322 *U.S.* 202, 88 *L.Ed.* 1227 (1944).

or lays a burden on the exercise of this privilege is void under the commerce clause." *Id.* at 291, 66 *L.Ed.* at 244.

In *Allenberg Cotton Co., Inc. v. Pittman*, 419 *U.S.* 20, 42 *L.Ed.* 2d 195 (1974), the Supreme Court invalidated an application of a Mississippi statute that required foreign corporations to obtain a certificate of authority to qualify to do business in the state. Because of a corporation's failure to comply with the statute, the trial court entered judgment for the defendant in the corporation's suit to enforce a transaction that was part of interstate commerce. The Court held "only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause." *Id.* at 34, 42 *L.Ed.* 2d at 206. The Court's opinion made no reference to the cost of the certification requirement or to whether the requirement would subject the foreign corporation to suit within the state.

The plurality's position in today's case was explicitly rejected by the Supreme Court in *Allenberg Cotton*. The position that "the burden imposed on interstate commerce by such statutes is to be judged with reference to the measures required to comply with such legislation, and not the sanctions imposed for violation of it", gained the support of only the one dissenting Justice. *Allenberg Cotton*, 419 *U.S. at* 42, 42 *L.Ed.* 2d at 211 (Rehnquist, J., dissenting).

*Allenberg Cotton* and *Sioux Remedy* have been characterized as cases whose decisions were based on the states involved having barred foreign corporations from their state courts. *Coons v. Honda Motor Co.*, 469 U.S. 1123, 83 *L.Ed.* 2d 800, 801 (1985) (Rehnquist, J., dissenting from

the denial of certiorari). Justice Rehnquist noted that when states bar access to state courts, "out-of-state corporations which entered into contracts in-state [have] no forum in which to enforce these contracts, and out-of-state competition [is] effectively precluded." 83 *L.Ed.* 2d at 802.

The plurality in this case argues that the Reporting Act should be upheld because it merely facilitates the assessment and collection of taxes. However, this characterization could also be applied to the foreign corporation statutes struck down in the Supreme Court cases discussed earlier. *See Allenberg Cotton, supra,* 419 *U.S.* at 40 n.6, 42 *L.Ed.* 2d at 210 n.6 (Rehnquist, J., dissenting).

The plurality ignores the doctrine of unconstitutional conditions in asserting that because the reporting requirement is reasonable, it can be enforced even with the most severe of sanctions. "[I]t may be conceded that a state may restrict the right of [foreign] corporations to engage in business within its limits. But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state actions." *Sioux Remedy,* 235 *U.S.* at 203, 59 *L.Ed.* at 197 (citations omitted). The states are simply without power to put an undue burden on interstate commerce even to support an otherwise valid state objective. *Cf. Philadelphia v. New Jersey,* 437 *U.S.* 617, 626, 57 *L.Ed.* 2d 475, 483 (1978) ("the evil of protectionism can reside in legislative means as well as legislative

ends").[6] Barring access to state courts is such an "undue burden."

The plurality's "judicial surgery" alters the Act to allow corporations who have not complied with the reporting requirement to sue in the state courts if it first files the delinquent required reports. *Ante* at— (slip op. at 17-20). Admittedly this alteration makes the Act a less onerous burden on interstate commerce. However, this alteration does not make the Act constitutional. As altered, the Act still allows the State to bar access to its courts if the corporation does not file a report. This allowance cannot be given under the commerce clause. I believe the relevant Supreme Court decisions must be read to preclude states from either absolutely or conditionally closing their courts to corporations that are doing business only in interstate commerce.

The application of the Corporate Business Activities Reporting Act to bar access to foreign corporations to state courts, when this refusal of access prevents enforcement of transactions within interstate commerce, is unconstitutional under the commerce clause of the federal constitution. For that reason, I would reverse the decision of the Appellate Division in this case.

Justice CLIFFORD joins in this opinion.

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[6] Nor can it be argued that barring access to the state courts is the only means of enforcing the reporting requirement. *See* Note, "Sanctions For Failure To Comply With Corporate Qualification Statutes: An Evaluation", 63 *Colum. L. Rev.* 117 (1963).

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4837-84T5

FIRST FAMILY MORTGAGE
CORPORATION OF FLORIDA,

Plaintiff-Appellant,

v.

LINDA A. DURHAM,

Defendant-Respondent,

and

MR. LINDA DURHAM,

Defendant,

and

ATTORNEY GENERAL OF NEW JERSEY,

Intervenor-Respondent.

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Argued October 2, 1985—Decided November 14, 1985.

Before —Judges Fritz, Brody and Baime.

On appeal from Superior Court of New Jersey, Chancery Division, Camden County.

William M. E. Powers, III, argued the cause for appellant (William M. E. Powers, Jr., attorney; William M. E. Powers, III, on the brief).

Beverly K. Thompson argued the cause for respondent Linda A. Durham.

Harry Haushalter, Deputy Attorney General, argued the cause for intervenor-respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Mr. Haushalter, on the brief).

The opinion of the court was delivered by BRODY, J.A.D.

Plaintiff, a Florida corporation not authorized to do business in New Jersey, appeals from an order for summary judgment dismissing, without prejudice, its suit to foreclose a mortgage on respondent's New Jersey home. The dismissal is based on plaintiff's failure to file the "notice of business activities report" required by *N.J.S.A.* 14A:13-15(e) (hereafter referred to as "the statute") of "every foreign corporation" that receives within "any calendar or fiscal accounting year . . . payments from persons residing in this State . . . aggregating in excess of $25,000.00 regardless of any other connection with this State; . . . ." A foreign corporation not authorized to do business in New Jersey may not "maintain any action or proceeding in any State or Federal court in New Jersey, until such corporation shall have filed a timely notice of business activities report." *N.J.S.A.* 14A:13-20(a). We affirm the dismissal.

Plaintiff concedes that it has never filed the notice. It argues that the Commerce Clause of the federal constitution protects it from the reach of the statute because it is engaged solely in interstate commerce. Plaintiff acquired the mortgage in the secondary mortgage market along with other federally guaranteed home mortgages from around the country. These mortgages are sold to investors in the form of Government National Mortgage Association

(GNMA) securities issued pursuant to 24 *C.F.R.* § 390 under the National Housing Act, 12 *U.S.C.A.* 1716 *et seq.*

We adhere to our holding in *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J. Super.* 358 (App. Div. 1977), that a foreign corporation engaged in interstate commerce may constitutionally be denied access to our courts until it files a notice of business activities report even though it may later be determined that the corporation is not engaged in intrastate business activities in New Jersey. The trial judge expressed reluctance to follow *Associates* because he concuded, based upon the information contained in a brief affidavit of plaintiff's vice-president, that plaintiff was not engaged in intrastate business activities in New Jersey. The information in that affidavit is essentially the same information that a notice of business activities report would have contained had plaintiff filed one.

As we explained in *Associates*, the purpose of the notice requirement is to identify foreign corporations engaged in taxable intrastate business activities in this state so that they will pay their fair share of taxes. *See Avco Financial Services Consumer v. Director*, 100 *N.J.* 27, 31-33 (1985). The statute imposes no tax upon foreign corporations that are protected by the Commerce Clause. It merely requires a foreign corporation that receives payments aggregating more than $25,000 a year from New Jersey residents to supply the minimal information that plaintiff supplied in this suit. This information permits the taxing authorities, and not the corporation, to make the final administrative determination as to whether the corporation is tax exempt. Plaintiff does not claim that filing the no-

tice would be onerous or would place it at a competitive disadvantage.

Plaintiff argues that in *Associates* we overlooked numerous cases holding that a state may not directly or indirectly require a foreign corporation engaged solely in interstate commerce to obtain a license or certificate of authority to do business in the state. *E.g., Eli Lilly and Co. v. Sav-On-Drugs*, 366 *U.S.* 276, 278-279, 81 *S.Ct.* 1316, 1318, 6 *L.Ed.*2d 288, 291-292 (1961); *Coons v. American Honda Motor Co.*, 94 *N.J.* 307, 318 (1983). Plaintiff correctly states the holding in those cases, but they are distinguishable because the statute considered here and in *Associates* does not require licensure. A key feature of licensure statutes is a provision that requires a foreign corporation to appoint a local registered agent "upon whom process against the corporation may be served." *See, e.g., N.J.S.A.* 14A:13-4(1)(d). A state may not require a foreign corporation engaged solely in interstate commerce to consent to being sued in that state as the price of doing interstate business there.

By contrast, compliance with *N.J.S.A.* 14A:13-15 does not expose foreign corporations engaged solely in interstate commerce to lawsuits in this state. It merely requires that foreign corporations receiving substantial annual payments from New Jersey residents file information that will enable New Jersey to determine whether they are exempt from taxation.

Plaintiff also argues that the statute violates the Supremacy Clause of the federal constitution because it undermines the policy of the National Housing Act. We disagree. It is true, as plaintiff contends, that New Jersey may not

render GNMA mortgages on New Jersey homes unmarketable by denying foreign corporate mortgage-holders the right of foreclosure. *See Guttenberg S. & L. Ass'n. v. Rivera,* 85 *N.J.* 617, 631 (1981) (Anti-Eviction Act, *N.J.S.A.* 2A:18-61.1 *et seq.,* may not be applied to bar removal of tenants in a suit to foreclose a mortgage guaranteed by the Federal Housing Authority). *N.J.S.A.* 14A:13-20(a) does not, however, deprive a foreign corporate mortgage-holder of its right to foreclose a GNMA mortgage on a New Jersey home. The holder is free to foreclose as long as it has first filed a notice of business activities report. The slight inconvenience of filing the notice will not destroy the market for GNMA mortgages on homes in New Jersey and in other states having a similar requirement. *See Stuyvesant Town v. Ligham,* 17 *N.J.* 473 (1955) (state rent control statute applied to property owned by a corporation operating under the National Housing Act).

In the event plaintiff renews its foreclosure suit after filing a notice of business activities report, the trial judge will then have to decide whether plaintiff was obliged to obtain a certificate of authority to do business in this state as required by *N.J.S.A.* 14A:13-3. "No foreign corporation transacting business in this State without certificate of authority shall maintain any action or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority . . . ." *N.J.S.A.* 14A:13-11. Respondent had raised as a defense plaintiff's failure to obtain a license or certificate of authority to do business in a state unless the corporation is engaged in intrastate business activities in that state. The judge's gratuitous statement that plaintiff was not engaged in intrastate business activities in New Jersey may not be considered a find-

ing of fact tantamount to striking respondent's defense in the event plaintiff renews its foreclosure suit. Respondent is entitled to discovery before the point is considered for adjudication.

Affirmed.

A TRUE COPY

/s/ Elizabeth McLaughlin
Clerk

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

(SEAL)

CHAMBERS OF
PAUL A. LOWENGRUB
JUDGE

HALL OF JUSTICE
CAMDEN, NJ 08103

April 2, 1985

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Re: First Family Mortgage Corporation of Florida
v. Linda A. Durham
Docket No. F-4964-83

Dear Counsel:

Procedurally this case is before the court on plaintiff's motion to strike defendant's fourth separate defense as pleaded in the answer and counterclaim, as follows:

> The plaintiff, First Family Mortgage has not the legal capacity to maintain this action, in that the Plaintiff's claim is based upon an alleged contract made in the State of New Jersey, and Plaintiff, First Family Mortgage, has not procured a license to transact business in the State of New Jersey.

It is clear from the record that plaintiff is a Florida corporation whose principle place of business is in Illinois. Plaintiff has neither received a certificate of authority to transact business in New Jersey pursuant to *N.J.S.A.* 14A:13-3 nor has it filed a notice of business activities report pursuant to *N.J.S.A.* 14A:13-15. It has neither an of-

fice, employee, salesperson nor representative in New Jersey. The certification of Mr. Paul Prazak, a vice president of plaintiff corporation, includes the following statement which is uncontroverted: "We buy, acquire servicing (sic) and trade loans so often that we might have loans secured by New Jersey real estate one day and the very next be completely out of that state." Plaintiff does not originate loans in New Jersey and it has no intrastate dealings in New Jersey. The only loans secured by New Jersey real estate it acquires is through the secondary mortgage market.

Plaintiff invests in and services FHA and VA guaranteed mortgages, and acts as a servicing custodian for Government National Mortgage Association (GNMA) loans, pursuant to 24 *C.F.R.* § 390. The "secondary market" involves transfers of previously originated loans to permanent investors to be directly owned or "pooled" into GNMA mortgagee backed securities ultimately sold in shares to customers.

The mortgage loan to defendant made by Provident Mortgage Corporation, a New Jersey corporation, is VA guaranteed and is part of a GNMA "pool" or group of similar loans. The original mortgage from defendant, Linda A. Durham, to Provident Mortgage Corporation is dated April 17, 1980, and concerns lands located in New Jersey. By successive assignments it was ultimately acquired by plaintiff together with 67 other loans from Mid States Mortgage and Service Company, located in Downer Grove, Illinois; 54 of those loans were secured by New Jersey real estate and fourteen were secured by Pennsylvania real estate.

Contracts between plaintiff's representatives or employees and defendant were limited to correspondence and telephone conversations directed to defendant at her home in New Jersey regarding the status of her mortgage account. Plaintiff received the mortgage payments from defendant, a New Jersey resident, mailed from this state.

The real estate mortgage and note were owned by an Illinois corporation (Mid States) when the plaintiff purchased it together with other mortgages in the secondary market. A mortgage is defined as a lien or an interest in reality. *Garnick v. Serewitch*, 39 *N.J.Super.* 486; 496 (Ch. Div. 1956); and security for the payment of a debt, *Vineland Savings & Loan Assn. v. Felmey*, 12 *N.J.Super.* 384, 391 (Ch. Div. 1951). By virtue of its holding the note and the mortgage, plaintiff did not have possession or the right to possession of the New Jersey lands which were subject to the mortgage. *Tracy v. Costa*, 132 *N.J.Eq.* 455, 458 (E. & A. 1942). That right of possession would not occur until there was a default in the payment of the debt by the mortgagor and a judgment of foreclosure. *Id.*

In this case the plaintiff's contact with New Jersey consisted of its correspondence and telephone conversations with the defendant in an effort to have the payments due on the note and mortgage made current. While the phrase "carried on any activity" in *N.J.S.A.* 14A:13-15 is not otherwise susceptible of precise definition, subsection (e) provides that notice must be filed upon:

> (e) receiving payments from persons residing in this State, . . . aggregating in excess of $25,000.00 regardless of any other connections with this State; . . .

The facts in this case are that plaintiff does receive payments in excess of $25,000.00 in a single calendar year from mortgagors residing in New Jersey, which payments are due under mortgages which it acquires in the "secondary market."

Facially, therefore, plaintiff is required to file a notice of business activities report, *N.J.S.A.* 14A:13-15, unless it is specifically exempted under *N.J.S.A.* 14A:13-16. It is clear that plaintiff had not filed under the aforesaid Acts and does not qualify for the exemption from filing the notice of business activities report.

The precise question presented under the facts in this case is whether the statutory prohibition imposed upon foreign corporations which precludes them from bringing suit in New Jersey because they have not filed a notice of business activities report is in conflict with the Commerce Clause of the United States Constitution? I have determined the answer is yes, there is such an impermissible conflict. However, I am bound by the holding in *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J. Super.* 358 (App. Div. 1977), to dismiss the plaintiff's complaint for failure to file pursuant to *N.J.S.A.* 14A:13-20.

*N.J.S.A.* 14A:13-15 provides:

> *Notice of business activities report; necessity; filing; activities or property maintenance covered*
>
> Every foreign corporation which during any calendar or fiscal accounting year ending after December 31, 1973, carried on any activity or owned or maintained any property in this State, unless specifically exempted under section 3 of this act, shall be required

to file a notice of business activities report as hereinafter provided.

Activities or property maintenance in this State which require corporations to file this report are:

a. the maintenance in this State of an office or other place of business; or

b. the maintenance of personnel in this State, including the presence of employees, agents, representatives or independent contractors in connection with the corporation's business, even though not regularly stationed in this State; or

c. the ownership or maintenance of real and/or tangible personal property directly used by the corporation in this State; or

d. the ownership or maintenance of tangible and/or intangible property in this State which is used by others; or

e. receiving payments from persons residing in this State, or business located in this State, aggregating in excess of $25,000.00 regardless of any other connections with this State; or

f. the derivation of income from any source or sources within this State, or

g. any other activity or property in, or interrelationships with, this State as designated by the director.

A foreign corporation is exempted from filing the notice of business activities report if by the end of the accounting period for which it was required to file it received a certificate of authority to do business in New Jersey, *N.J.S.A.* 14A:13-16 (a); or a timely return was filed under the Corporation Business Tax Act, *N.J.S.A.* 54:10A-1 *et seq.*; or the Corporation Income Tax Act, *N.J.S.A.*

54:10E-1 *et seq.* for the requisite accounting period, *N.J.S.A.* 14A:13-16 (b).

It is clear that plaintiff is not in compliance with either sub-section of *N.J.S.A.* 14A:13-16. Therefore, *N.J.S.A.* 14A:13-20 is applicable, particularly sub-sections (a) and (b), as follows:

> *Failure to file timely report*
>
> a. No foreign corporation carrying on any activity or owning or maintaining any property in this State which has not obtained a certificate of authority to do business in this State and disclaims liability for the corporation business tax and the corporation income tax shall maintain any action or proceeding in any State or Federal court in New Jersey, until such corporation shall have filed a timely notice of business activities report.

In *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J.Super.* 358 (App. Div. 1977) the plaintiff appealed from the grant of summary judgment in favor of defendant dismissing the complaint on the ground that plaintiff, a foreign corporation, failed to comply with the Corporation Business Activities Reporting Act, *N.J.S.A.* 14A:13-4 *et seq.* The essential facts, stipulated by the parties thereto were that plaintiff is a Pennsylvania corporation with an office in Morrisville, Pennsylvania. The defendants went to Morrisville to obtain the loan in question. A note was executed by defendants at plaintiff's office for which defendants received a check drawn on a Pennsylvania bank. Plaintiff does not have, nor did it apply for a certificate of authority to do business in New Jersey as a foreign corporation, *N.J.S.A.* 14A:13-4. The plaintiff had not filed the notice of business activities report

required by *N.J.S.A.* 14A:13-15. All transactions made by the plaintiff were consummated by execution of the note and delivery of consideration in Pennsylvania. Plaintiff's loan portfolio represented in excess of $25,000.00 accounts receivable from this state. *N.J.S.A.* 14A:13-15(e). Plaintiff does not maintain an office or place of business in New Jersey, however it does use the United States mails and it does use the telephone in an attempt to enforce collection of delinquent accounts.

The plaintiff argued on appeal that it was engaged solely in interstate commerce and thus the "imposition of an income tax by this state is an unconstitutional burden upon interstate commerce." *Id.* at 361.

In affirming the judgment of the trial court and determining that the Corporation Business Activities Reporting Act was initially an "information gathering" act and not a taxing measure the court found "no constitutional infirmity in either the notice requirement of the Act or the sanctions imposed therein for failure to file. These are entirely reasonable means designed to achieve an essential state purpose—the strengthening of the enforcement of its tax laws." *Id.* at 362-63. The stated purpose of the Act was:

> . . . to enable the Division of Taxation to obtain pertinent data from any foreign corporation which carries on an activity or owns or maintains property in this State but which has not obtained a certificate of authority to do business in New Jersey, to the end that a proper determination may be made as to whether such corporation is subject to any State tax.

*Id.* at 362.

The defendant, in *Bank Leumi Trust Co. v. Schneider*, 188 *N.J.Super.* 423, (App. Div. 1982) appealed from a denial of her motion to dismiss the complaint because of the failure of plaintiff, a bank incorporated in New York, to comply with *N.J.S.A.* 14A:13-14 *et seq.* It was admitted on behalf of the bank that it received sufficient payments from New Jersey accounts to be included within *N.J.S.A.* 14A:13-15(e).

The Appellate Division considered the interrelationship between the Banking Act and the Reporting Act and concluded that although the former Act did not prohibit a foreign bank from enforcing obligations in New Jersey acquired by it in the transaction of business outside of New Jersey, *N.J.S.A.* 17:9A-331(3), nevertheless the foreign bank was compelled to comply with the Reporting Act or to suffer the sanctions imposed therein.

> In reaching his conclusion that the sanctions of the Reporting Act "do not apply under the facts of this case" the trial judge reasoned that "the economy of New Jersey would suffer a substantial blow" if New Jersey mortgages could only be sold to corporations which have complied with the act and that reduction in the potential market "would tend to cause higher interest rates for borrowers." 184 *N.J.Super.* at 197. These concerns address the wisdom of the Reporting Act sanctions, not their viability. Even if invocation of those sanctions would have an economic impact unanticipated by the Legislature, we cannot properly declare them inoperative.

*Id.* at 429.

It is to be noted that the issue raised by the Commerce Clause of the United States Constitution was not addressed

by the court, nor from the opinion, was it presented to or argued by counsel.

The interplay between the certificate of authority sections of the General Corporation Act, *N.J.S.A.* 14A:13-14 *et seq.*, and the foreign bank provisions of the Banking Act of 1948, *N.J.S.A.* 17:9A-315 *et seq.*, was reexamined in *American Bank & Trust Co. of Pennsylvania v. Lott*, 193 *N.J.Super.* 516 (App. Div. 1984). The Court held:

> (w)here a foreign bank has obtained a Certificate of Authority from the Commissioner of Banking under the Banking Act, even when it performs acts outside the scope of that certificate but within the exempt transactions provisions of the act (*N.J.S.A.* 17:9A-331), it is relieved from filing a notice of Business Activities Report under *N.J.S.A.* 14A:13-16(a).

*Id.* at 518.

Again, the issue of the constitutionality of the Reporting Act was not addressed by the court. Because the court found another ground for deciding the case it followed the precept "that constitutional questions are to be avoided if the case can be disposed of on other grounds." *Id.* at 521, *citing Donadio v. Cunningham*, 58 *N.J.* 309, 325-26 (1971).

The question of whether *N.J.S.A.* 14A:13-4 *et seq.* and similar state statutes which require a certificate of authority to do business as a prerequisite to the maintenance of an action, is constitutional pursuant to the Commerce Clause of the United States Constitution when the foreign corporation is engaged solely in interstate commerce has been addressed by the courts.

In the case of *Sioux Remedy Company v. Cope*, 235 *U.S.* 197, 35 *S.Ct.* 57, 59 *L.Ed.* 193 (1914), plaintiff, an

Iowa corporation sued the defendant in the State Court of South Dakota, to enforce payment of the purchase price of merchandise sold pursuant to a contract made in South Dakota. The contract required that the merchandise be shipped by plaintiff from Iowa to South Dakota. The defense that plaintiff had not complied with a South Dakota licensure statute prescribing conditions which foreign corporations must meet before being permitted to sue in South Dakota courts was sustained and the complaint dismissed.

The Supreme Court reversed the judgment of the state court. It concluded that the contract and sale were transactions in interstate commerce and legitimate notwithstanding plaintiff's non-compliance with the South Dakota statutes which required the filing with the Office of the Secretary of State of South Dakota an authenticated copy of its charter or articles of incorporation; that it appoint a resident agent to accept service of process and file a copy of the appointment with the Office of the Secretary of State and of the register of deeds of the county where the agent resides; and that it pay a fee of approximately $25.00 incident to the filing and recording of the documents. *Id.* at 200.

In considering the conditions imposed by the statute the Court concluded that "they have no natural or reasonable relations to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous." *Id.* at 205. Thus the Court found that compliance with the statute as a precondition to the right to sue in South Dakota was unreasonable and burdensome and in conflict with

the Commerce Clause of the United States Constitution. *Id.* at 205.

In the case *Eli Lilly and Company v. Sav-On-Drugs*, 57 *N.J. Super.* 291 (Ch. Div. 1959), *aff'd.* 31 *N.J.* 591 (1960), *aff'd.* 366 *U.S.* 276, 81 *S.Ct.* 1316, 6 *L.Ed.* 2d 288 (1961) the courts found Eli Lilly engaged in interstate as well as intrastate commerce. The factual finding was based on the following: plaintiff maintained an office in Newark, New Jersey; its name was on the door and on the tenant registry in the lobby of the building; it maintained a listing in the Newark Telephone Directory listing its New Jersey office; the lessor of the office space was an employee of plaintiff who was reimbursed for all office expenses; a secretary in the office was paid directly by plaintiff; 18 "detailmen" under the district manager's supervision were paid regular salaries by plaintiff; the detailmen travel the State of New Jersey promoting the sale of plaintiff's pharmacutical products to "physicians, hospitals and retailers who buy the products in intrastate commerce from the wholesalers." *Id.* at 280. Justice Black writing for the United States Supreme Court stated:

> It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers. Under the authority of the so-called "drummer" cases, such as *Robbins v. Shelby Taxing District* . . . Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State. On the other hand, it is equally well settled that if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of

> authority to do business. In such a situation, Lilly could not escape state regulation merely because it is also engaged in interstate commerce.

*Id.* at 278-79.

The statute at issue in the *Lilly* case was *N.J.S.A.* 14:15-4, the predecessor statute to *N.J.S.A.* 14A:13-11, which requires foreign corporations transacting business in New Jersey to obtain a certificate of authority before any action or proceeding may be brought in the State courts.

The Supreme Court concluded that in light of *N.J.S.A.* 14A:13-11, the only reasonable inference it could draw from the trial court's decision requiring the Indiana Corporation to obtain a certificate of authority, was that the phrase, "transacting business" meant "transacting local intrastate business and concluded from the facts that Lilly was transacting such business." *Id.* at 283.

At issue in the case of *Materials Research Corp. v. Metron,* 64 *N.J.* 74 (1973), was whether the application of the foreign corporation qualification provision, (*N.J.S.A.* 14A:13-3) to plaintiff's activities unconstitutionally burdened interstate commerce? After a detailed review of the salient facts the Court concluded that on the limited record before it there was an insufficient showing of intrastate commerce to bar plaintiff from maintaining the suit and thus the plaintiff was not "transacting business" pursuant to *N.J.S.A.* 14A:13-3. The Court reversed the judgment of the lower court and remanded the case for further proceedings. The Court noted, in reference to *N.J.S.A.* 14A:13-11 that:

> Among the recognized constitutional limitations on the states' ability to regulate foreign corporations through qualification statutes are those arising from the Commerce Clause of the United States Constitution, art. 1, § 8, c.e.3. Thus, the law has long been settled that a state may not impose a qualification statute which unduly burdens interstate commerce. (citations omitted).

*Id.* at 79.

In *Coons v. American Honda Motor Co.*, 94 *N.J.* 307 (1983) the New Jersey Supreme Court held that *N.J.S.A.* 2A:14-22, which tolls the running of the applicable statute of limitations "unconstitutionally burdens interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate of authority to do business (*N.J.S.A.* 14A:13-4) in order to gain advantage of the statute of limitations." *Id.* at 309. The court noted that generally state regulations affecting interstate commerce are upheld if they are rationally related to a legitimate state end. *Id.* at 316. However:

> Notwithstanding that general rule, the Supreme Court has invalidated state statutes, without balancing the competing interests, as *per se* violations of the Commerce Clause in the area of licensing requirements imposed on foreign corporations involved in interstate commerce. In a series of decisions the Supreme Court has held that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state.

*Id.* at 317 (*citing Allenberg, infra; Dahnke Walker, infra* and *Sioux, supra.*)

Thus the court struck down *N.J.S.A.* 2A:14-22 as a forced licensure provision in violation of the commerce clause. *Id.* at 318.

In *Dahnke Walker Milling Co. v. Bondurant*, 257 *U.S.* 282, 42 *S.Ct.* 106, 66 *L.Ed* 239 (1921) the plaintiff, a Tennessee corporation brought an action to recover damages for breach of contract for the sale of wheat. The defendant was a Kentucky farmer and the action was brought in a state court of Kentucky. The principal defense interposed was that the plaintiff had not qualified to do business in the state pursuant to a Kentucky reporting statute and thus the contract was enforceable. *Id.* at 286. The Court held that the transaction was a part of interstate commerce and thus the statute as applied in the case at bar was unconstitutional. *Id.* at 292-93.

> It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce.

*Id.* at 292.

In *Allenberg Cotton Co. v. Pittman*, 419 *U.S.* 20, 95 *S.Ct.* 260, 42 *L.Ed.* 195 (1974), the Court held that a Missis-

sippi statute prohibiting a foreign corporation transacting business in that State without a certificate of authority from maintaining a suit in Mississippi to be invalid as repugnant to the commerce clause where the foreign corporation was solely engaged in interstate commerce.

The Mississippi Supreme Court held that the appellant's transactions were solely intrastate in nature and thus precluded appellant from access to the state courts. Plaintiff-appellant claimed the statute was repugnant to the Commerce Clause of the United States Constitution.

The Supreme Court noted that:

> The contract entered into between appellant and Pittman was a standard "forward" contract, executed in January 1971 and covering the crop to be grown that year. Such contracts have become common in the American cotton-marketing system; they provide a ready way for the cotton farmer to protect himself against a price decline by ensuring that he will be able to sell his crop at a sufficient price to cover his expenses. The merchant who has contracted to buy the cotton from the farmer must in turn protect himself against market fluctuations. In this case, appellant had entered into contracts for sale of cotton to customers outside Mississippi, in quantites approximating the expected yield of the Pittman contract and appellant's other Mississippi contacts. A resale contract of this sort ensures that the merchant will be able to cover his own expenses and recoup a small profit; alternatively, the merchant may protect himself by "hedging", i.e. offsetting his purchases with a sale of futures contracts on the cotton exchange. The stability of the position he has constructed for himself, however, clearly depends on the integrity and enforceability of his contracts for purchase and resale.

*Id.* at 26, 27.

Thus the court held:

> We deal here with a species of control over an intricate interstate marketing mechanism. The cotton exchange, like the livestock-marketing regime involved in *Swift & Co. v. United States*, 196 *U.S.* 375, 49 *L.Ed.* 518, 25 *S.Ct.* 276 (1905), and in *Stafford v. Wallace*, 258 *U.S.* 495, 66 *L.Ed.* 735, 42 *S.Ct.* 397, 23 *ALR* 229 (1922), has federal protection under the Commerce Clause.

*Id.* at 29.

The court in *Allenberg* cited to *Hood & Sons v. Du Mond*, 336 *U.S.* 525, 69 *S.C.* 657, 93 *L.Ed.* 865 (1949) as expressing the philosophy of the Commerce Clause.

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vest in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states . . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. (sic). Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

*Id.* at 31.

It should be noted that the Court in *Allenberg* had before it a statute substantially similar to *N.J.S.A.* 14A:13-11. Significantly, it did not review nor decide any local

tax incidents of plaintiff's contacts with Mississippi. The Court stated:

> In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business. Whether there were local tax incidents of those contacts which could be reached is a different question on which we express no opinion. Whether the course of dealing would subject appeallant to suits in Mississippi is likewise a different question on which we express no view. We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause.

419 *U.S.* at 33, 34

The power of the State of New Jersey to tax plaintiff in this case is not before this court and is not to be decided by this court. Nor to be decided is what information must be supplied to the State in the enforcement of its taxing power. Precisely, the issue in the imposition of the sanction contained in the Reporting Act that bars plaintiff from enforcing an obligation acquired in interstate commerce in the courts of this state *vis* a *vis* the Commerce Clause of the United States Constitution. There is not one scintilly of evidence that plaintiff is doing any business in New Jersey. This case is factually distinguished from *Eli Lilly, supra.* Plaintiff is not engaged in both intrastate and interstate commerce. Factually the methodology of commerce in the "secondary mortgage" market treats mortgages in a manner similar to cotton (*Allenberg Cotton Co. Inc. v. Pittman, supra*) or wheat (*Dahnke-Walker Milling Co. v. Bondurant, supra*).

Since the activities of plaintiff are wholly outside of New Jersey, treating it differently from a citizen of New Jersey by barring it access to the courts of this State imposes a burden on interstate commerce. *Sioux Remedy Co. v. Cope, supra.*

The United States Supreme Court held in *International Textbook Co. v. Pigg,* 217 *U.S.* 91 (1910) that a Kansas state statute which in effect required a foreign corporation engaging in interstate commerce to obtain a license to do business in the state was unconsittutional under the Commerce Clause of the United States Constitution. The court cited to *Chambers v. Baltimore & Ohio Railroad Co.,* 207 *U.S.* 142, 148 which states:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution." How far a corporation of one State is entitled to claim in another State, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the Statement mentioned in § 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form

> or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a Statement setting forth certain facts which the State, confessedly, could not control by legislation.

*Id.* at 111-12.

Regardless of the authorities I have cited and whatever I conclude the result in this case should be I am bound by the rule in *Associates Consumer Discount Co. v. Bozzarello*, 149 *N.J.Super.* 358 (App. Div. 1977); *Reinauer Realty Corp. v. Paramus*, 34 *N.J.* 406, 415 (1961). Therefore, the plaintiff's motion to strike the fourth separate defense contained in the answer is denied.

However, I respectfully disagree with the holding of *Bozzarello*. The Appellate Division addressed the Reporting Act, *N.J.S.A.* 14A:13-15, and upheld, in the context of that case the Act to be constitutional. However, the issue raised by the Commerce Clause was not addressed nor dealt with by the court. I have endeavored to set forth the rule of law enunciated by the Supreme Court of the United States and of this State which precludes state action the effect of which is to impermissibly burden interstate commerce. To bar a foreign corporation from access to our courts where it is not engaged in intrastate commerce is an impermissible burden on interstate commerce. The New Jersey cases concerning the Reporting Act do so in a setting not inclusive of the Commerce Clause. It is in that framework that the issue of

the constitutionality of the Reporting Act should be determined.

The plaintiff argument at *N.J.S.A.* 14A:13-3 *et seq.* violates the Supremacy Clause of the United States Constitution, in the case at bar, is rejected. The relevant statutes are ont in conflict with the National Housing Act, 12 *U.S.C.A.* 1716, or the regulations promulgated thereunder. *McGlynn v. N.J. Public Broadcast Auth.*, 88 *N.J.* 112 (1981).

Very truly yours,

/s/ Paul A. Lowengrub
Paul A. Lowengrub, J.S.C.

PAL/rg